Jurisdictional Statement

81-1351

No.

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IN THE

Supreme Court of the United States

October Term 1981

STEVEN MICHAEL SMITH,
Appellant,

v.

STATE OF FLORIDA,
Appellee,

ON APPEAL FROM
THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This appeal raises the question of whether a state, by statute, may constitutionally employ a scheme of severe, minimum mandatory prison sentences and fines to compel criminal defendants to serve as informants for law enforcement agencies with no co-extensive grant of immunity from prosecution for providing incriminatory information.

This appeal contemplates several additional questions, which, by the synergistic nature of the statute sought to be reviewed, should be considered by this court to be one broad question of interrelated parts, as well as separate components to be scrutinized independently. Those questions are:

May a state, by statute, consti-

tutionally inflate mandatory penalties for the express purpose of forcing defendants to provide information that is necessarily self-incriminatory, with no immunity, and a concommitant inducement that the state will, at the sole option of the prosecutor, deflate the penalty if the defendant's performance is "substantial"?

May a state constitutionally employ the above procedure whereby the prosecutor, alone, is empowered to initiate mitigation?

May a state constitutionally employ the above procedure whereby the defendant is deprived of all procedural safeguards of due process and the prosecutor is not subject to guidelines or restrictions while the trial court is precluded from intervention?

May a state, consistent with equal protection guarantees, levy identically severe mandatory minimum punishments, with no opportunity for parole or probation, on defendants possessing vastly different amounts of a controlled substance in its pure form?

TABLE OF CONTENTS

Opinions Below.....1

Jurisdiction.....2

Constitutional Provisions and Statutes.....5

Statement of the Case.....5

The Questions Presented Are Substantial.....10

Conclusion.....34

Appendix

Copies of Opinions and Orders to be Reviewed

A. Order of the District Court of Appeals, State of Florida, Fourth District Vacating Order of Dismissal of Trial Court.....a-1

Copies of Other Opinions and Orders

B. Order of Circuit Court on Motion to Dismiss.....a-3

C. Order of The District Court of Appeals Reversing the Order of Dismissal of the Circuit Court.....a-21

D. Order of the District Court of Appeals Denying Motion for Rehearing.....a-23

Notice of Appeal.....a-24

Other Appended Material

E. Motion to Dismiss the Information.....a-26
F. Notice of Appeal to the District Court of Appeals, State of Florida, Fourth District.....a-33
G. Motion Seeking Order to Show Cause.....a-35
H. Order to Show Cause Why Appeal Should Not be Summarily Reversed.....a-37
I. Response to Order to Show Cause.....a-39
J. Constitutional Provisions and Statutes.....a-43
K. Opinion of Florida Supreme Court in State v. Benitez.....a-58
L. Hearing Committee on Bill 16, House of Representatives Committee on Criminal Justice (April 3, 1979).....a-67
M. Senate Committee Proceedings..a-95
N. "Graham Signs Stiff Drug Bill Into Law," The Gainesville Sun, (7 April 1979).....a-127

TABLE OF AUTHORITIES

CASES: PAGE

Carmona v. Ward
576, F.2d, 405, 425 (1978).....23

Carrington v. Rash,
390 U.S. 89 (1965).....18

Coker v. Georgia
433 U.S. 584 (1977).....26, 27

Cox Broadcasting Corporation v. Cohn,
420 U.S. 469 (1975).....4

Dodi Publishing Company v.
Editorial of America,
385 So.2d 1369 (Fla. 1980).....4

Gardner v. Broderick,
392 U.S. 280 (1968).....15

Garner v. Florida,
430 U.S. 349 (1977).....19

Garrity v. New Jersey
385 U.S. 493 (1967).....15

Jenkins v. State,
385 So.2d 1356 (Fla. 1980).....4

Lefkowitz v. Turley
514 U.S. 70 (1973).....15

Marshall v. Jerico,
446 U.S. 238 (1980).....19, 23

Mempa v. Rhay,
389 U.S. 128 (1957).....19, 20

Mills v. Alabama,
384 U.S. 214 (1966).....4

Nash v. Florida Industrial
Commission,
389 U.S. 234 (1967).....4

Roberts v. United States
445 U.S. 552 (1980).....12, 15

Rummel v. Estelle,
445 U.S. 263 (1980).....26, 27,
33

Skinner v. Oklahoma,
316 U.S. 535, 544 (1947).....18

Spevak v. Kelin,
385 U.S. 511 (1967).....15

Specht v. Patterson
386 U.S. 504 (1967).....19, 20

State v. Benitez,
395 So.2d 514 (Fla. 1981).....2, 6,
7, 9, 13, 14, 15, 20

Throp v. Dulles,
356 U.S. 86 (1958).....23

United States v. Brown,
381 U.S. 437 (1965).....18

United States v. Jackson,
39 U.S. 570 (1968).....15

United States v. Rogers,
504 F.2d 1079 (5th Cir. 1974).....12

United States v. Wheeler,
435 U.S. 313 (1978).....14

Weems v. United States
217 U.S. 349 (1910).....24

Williams v. Florida,
399 U.S. 78 (1970).....4

Statutes, Constitutions
Rules and Codes

Florida Statutes (1979)

893.135.....3, 4, 5, 6, 7, 8, 11, 13, 15, 16, 17, 18, 19, 22, 30, 31

775.082.....29

775.087.....29

948.01.....17, 29

947.18.....17

Florida Constitution

Article V, Section 4.....2

United States Constitution

Fifth Amendment.....13, 14

Eighth Amendment.....23
Fourteenth Amendment.....23

28 United States Code, Section 1257(2).....4

Other Authorities

Review for Excessiveness in Narcotic Cases 55 ALR 3d812 (1974).....24

Berger, Taking the Fifth (1980).....15

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

STEVEN MICHAEL SMITH

APPELLANT,

VS.

STATE OF FLORIDA

APPELLEE.

ON APPEAL FROM
THE DISTRICT COURT OF APPEALS
FOR THE STATE OF FLORIDA,
FOURTH DISTRICT

OPINIONS BELOW

The opinion of the District Court of Appeals for the State of Florida,

Fourth District, appears at pages (a-1) of Appendix.* In ruling upon the instant case, the District Court of Appeals for the State of Florida, Fourth District, relied upon and incorporated the prior opinion rendered by the Florida Supreme Court in State v. Benitez, 395 So. 2d 514 (Fla. 1981), as determinative of the issues raised by Appellant (Appellee below). See pages (a-58), in Appendix for the Benitez decision.

JURISDICTION

The proceeding giving rise to this appeal was brought by the State of Florida on appeal to the District Court of Appeals, for the State of Florida, Fourth District, pursuant to Article V, Section 4 of the Florida Constitution,

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*All designations styled (a1, a2,..) are to pages in Appendix.

to review the trial court's order holding Section 893.135, Florida Statutes (1979), unconstitutional and dismissing the information charging the Appellant (Appellee below) with a violation of the statute. The District Court of Appeals for the Fourth District of Florida issued its opinion on September 2, 1981 vacating the trial court's order and remanding the case for further proceedings. The order of the District Court of Appeals for the State of Florida, Fourth District, pursuant to its express term was not final until time expired to file motions for rehearing.

The Appellant (Appellee below) filed a Motion for Rehearing on September 11, 1981, which Motion was denied by the District Court of Appeals for the State of Florida, Fourth District on September 24, 1981. A timely Notice of Appeal was

filed on November 13, 1981.

Appellant has drawn into question the validity of Section 893.135 Florida Statutes (1979), under the Constitution of the United States, both as the statute is applied to the Appellant and the facial validity of the statute. Additionally, the District Court of Appeals for the State of Florida, Fourth District, is the highest court in the State of Florida in which a decision in this case could be had. Therefore, this Court has jurisdiction under 28 U.S.C. §1257(2). Mills v. Alabama, 384 US 214 (1966); Cox Broadcasting Corporation v. Cohn, 420 US 469 (1975); See Also, Nash v. Florida Industrial Commission, 389 US 234 (1967); Williams v. Florida, 399 US 78 (1970); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Dodi Publishing Company v. Editorial of America, 385 So. 2d 1369 (Fla. 1980).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions and Statutes, controlling the disposition of this cause, are lengthy. See Section 893.135, Florida Statute (1979) and amendments V, VIII and XIV to the Constitution of the United States. The pertinent text of each, set out verbatim, appears in the Appendix at pages (a-44 - a-57)

STATEMENT OF CASE

A. FACTS

On April 6, 1979, Governor Bob Graham gave his approval to the Florida Drug Trafficking Statute and signed the Bill enacting Section 893.135, Florida Statutes. The law has been characterized as Florida's reply to the "embarrassing national publicity" received by the State when the CBS-TV program "60-Minutes" ran a segment highlighting Florida's position

as the Nation's major entryway for drug smugglers (a-127-128). The Statute has further been described as a law designed to "create informants." (a-5-a-20) as the court in State v. Benitez, 395 So. 2d 514, 517 (Fla. 1981) noted, "(L)egislators knowingly glossed over alleged constitutional defects in the approach that was being developed" to compel drug violators to become informants.

The legislative history of Section 893.135, Florida Statutes, demonstrates that the primary consideration in developing and enacting this statutory scheme was to create a "rubber hose" for use on defendants who refuse to cooperate at the plea bargaining stage. (a-18 - a-20) Sub-section (1) of the Statute establishes severe mandatory minimum sentences and fines for trafficking in illegal drugs. Sub-section (2) prevents the trial court

from suspending, deferring or withholding adjudication of guilt or imposition of sentence on a person convicted under this law. Further, it eliminates the defendant's eligibility for parole during the minimum mandatory sentence. Under sub-section (3) these harsh penalties are theoretically diminished in that it permits the court, solely upon the initiative and discretion of the prosecuting attorney, to reduce or suspend the sentence if the defendant has rendered "substantial assistance" in the identification, arrest or conviction of accomplices, accessories, co-conspirators, or principals. Section 893.135, Florida Statutes (1979). See Also State v. Benitez, supra, at page 516-17.

B. PROCEEDINGS BELOW

On November 4, 1980, the Appellant filed a Motion to Dismiss a one count

information which charged a violation of 893.135(1)(b)(2). The Appellant's Motion to Dismiss argued that the pertinent charges were founded upon an unconstitutional statute. (a-26-a-32) the Defendant's Memorandum of Law in Support of his Motion to Dismiss set forth the questions sought to be reviewed by this court and was submitted to the lower tribunal on November 4, 1980.

On December 19, 1980, after reviewing the pertinent Memorandum of Law and hearing argument of counsel, the Circuit Court for the Seventeenth Judicial Circuit in and for Broward County, Florida granted the Motion to Dismiss, expressly finding Section 893.135, Florida Statute (1979), to be unconstitutional. (a-3)

On December 30, 1980, the State of Florida filed a Notice of Appeal with the District Court of Appeals of the

State of Florida, Fourth District. (a-33) While the instant case was pending on appeal in the Fourth District Court of Appeals, the Supreme Court of Florida filed its opinion in the case of State v. Benitez, supra.

On February 27, 1981, the State of Florida filed a Motion seeking Order to Show Cause while appeal should not be summarily reversed in light of the Supreme Court's decision in State v. Benitez. (a-35) On July 29, 1981, the District Court of Appeals for the State of Florida, Fourth District, issued an Order to Show Cause pursuant to the State's Motion. (a-37) and the Defendant responded to the Order of the Court on August 12, 1981. (a-39)

On September 2, 1981, the District Court of Appeals for the State of Florida, Fourth District, issued its per curiam

opinion, reversing the trial court's order and remanding the case for further proceedings. (a-1) The Order, pursuant to its express terms was not final until the time for filing rehearing petition had expired. The Defendant filed a Motion for Rehearing on September 11, 1981, which Motion was denied on September 24, 1981. (a-23) On November 13, 1981, a timely Notice of Appeal was filed with this Court. (a-24)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL ONES WHICH HAVE NOT PREVIOUSLY BEEN CONSIDERED BY THIS COURT

I. THE PRIVILEGE AGAINST SELF-INCRIMINATION

The question presented for determination by this Court is whether the State of Florida, by statute, may constitutionally employ a scheme of severe, mandatory minimum prison sentences and fines to compel criminal defendants to

serve as informants for law enforcement agencies.

Under Sub-section (3) of 893.135 Florida Statute, the discretion of the trial judge with respect to sentencing has been removed. The possibility for a reduction of sentence, suspension, or probation may be considered by the court only upon motion of the State Attorney. Further, the Statute permits the imposition of less than the mandatory minimum sentence only if the defendant provides "substantial assistance to authorities in the identification, arrest or conviction of any of his accomplices, accessories, co-conspirators or principals." 893.135, Florida Statute (1979).[1] This statutory scheme, in effect, required the

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[1]Section 893.135, Florida Statutes (1979) in Appendix.

defendant to "sing" about others involved in order to escape the harsh mandatory minimum sentence. The constitutional defect, then, is obvious. Roberts v. United States, 445 US 552 (1980); United States v. Rogers, 504 F. 2d 1079, 1085 (5th Cir. 1974), cert. denied, 422 US 1042.

The purpose and effect of this legislation are obvious. The legislators did little if nothing to camouflage their intentions in passing the bill. Indeed, according to State Representative Crawford:

> "The real thrust of this thing is to try and make sure that. . . the prosecution has enough of a hammer over that person's head to make them talk."

(a-19). See Also Appendix at pages (a-67-a-128) which clearly relfects that the motivation in the Senate in passing the Bill was the same.

In spite of the trafficking statute's obvious constitutional infirmities, it survived judicial scrutiny by the Florida Supreme Court in State v. Benitez, 395 So. 2d 514 (Fla. 1981). In that case, the court rejected the argument that Section 893.135 coerces a defendant into relinguishing any Fifth Amendment right. (a-58 - a-66). The Florida Supreme Court, in Benitez, concluded that the Florida lawmakers had simply put the defendant in the position of having to make a "difficult choice" 395 So. 2d at 519.

In so concluding, the court failed to consider the success of the legislative design, obviously calculated to confront the accused with a "Hobson's choice of either gambling for leniency, speaking and running the risk of additional prosecution, or remaining silent and facing

excessive penalties, inflated to an intolerable degree for the sole purpose of obtaining evidence of crime from the accused. Additionally, the Court's reasoning pre-supposes that there is no possibility of reversal, remand and retrial and assumes that the double jeopardy clause of the Fifth Amendment protects against prosecution by a separate sovereignty, which is not the case. See United States v. Wheeler, 435 US 313 (1978). While the court in Benitez acknowledged the risk of additional prosecution in other jurisdictions, the court nevertheless rejected the constitutional attack upon the statute, contrary to what common sense as well as a long list of opinions published by this tribunal would dictate. (a-58 - a-66)

The Fifth Amendment privilege was originally established and developed to

overcome abuses in the prosecution of heresy and treason.[2] Section 893.135 (1979) makes exercising ones Fifth Amendment privilege "costly."[3] The unvarnished legislative intent as well as the reasoning of the Florida Supreme Court in Benitez flys in the face of well developed constitutional precedents established by this very tribunal.[4] Consequently, the issues presented by this appeal are ripe for review by this court.

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[2]See Berger taking the Fifth, 1-23 (1980).

[3]As stated by the State Senator Spicola, the sponsor of the amended bill, "the reason for the Bill is to make the penalties stiff enough that. . .it's going to make it worth his wile (to talk)." ( ).

[4]See United States v. Jackson, 39 US 570 (1968); Garrity v. New Jersey, 385 US 493 (1967); Lefkowitz v. Turley, 514 US 70 (1973); Gardener v. Broderick, 392 US 280 (1968); Spevak v. Kelin, 385 US 511, 515 (1967); Roberts v. United States, 445 US 552 (1980).

II. DUE PROCESS OF LAW

The Florida trafficking statute is constitutionally defective in that it denies an accused due process, both procedural and substantive.

Under the dracoian regime of Section 893.135(1)(b)(3) and 893.135(2), "any person who is found to have violated" the provisions of Chapter 893 is guilty of a first degree felony and is automatically excluded from consideration for a suspended sentence, probation, or parole. This is true regardless of the defendant's age, education, background, family and community ties, status as a first offender or prospects for rehabilitation. This unusually harsh treatment is contrary to the ordinary eligibility of criminal defendants for consideration of alternatives to confinement as provided by law. For example, Section

948.01(3) Florida Statutes (1979), provides for probation, with or without adjudication of guilt, where "the defendant is not likely again to engage in a criminal course of conduct" and the welfare of society does not demand imprisonment. (a-54 - a-56) Similarly, Section 947.18 Florida Statutes (1977) provides for release on parole if the defendant "will ive and conduct himself as a respectable and law-abiding person" and be compatible with his own welfare and the welfare of society. (a-52) Thus, Section 893.135(2) removes from the sentencing judge and the probation and parole commission all of these alternatives to incarceration. In doing so, the Statute conclusively presumes that a defendant who is convicted of a violation under Chapter 893 is unfit for or unworthy of consideration

for suspended sentence, probation or parole.

This statutory presumption is obviously not universally nor necessarily true. Because it deprives a defendant or individualized determination of what is an appropriate treatment in his case, it violates due process of law. Skinner v. Oklahoma, 316 US 535, 544 (1947); Carrington v. Rash, 390 US 89, 96 (1965); United States v. Brown, 381 US 437, 454 (1965). Additionally, while it is elementary that administrative officials may exercise discretion under a statute with properly drawn and specific criteria for the exercise of such discretion, there are no such standards set forth in Section 893.135, Florida Statutes (1979). Under Section 893.135(3) the decision of the State Attorney as to whether or

not to move the trial court for reduction or suspension of sentence is left entirely to his or her subjective judgment. In essence, the legialature has given the State Attorney the power, in his or her sole discretion, to arbitrarily set in motion the machinery necessary for less than the mandatory minimum sentence to be imposed. Such legislative delegation and judicial encroachment is constitutionally invalid. See Marshall v. Jerico, Inc., 445 US 238 (1980); Mempa v. Rhay, 389 US 128 (1957); Specht v. Patterson, 386 US 504 (1967); Gardner v. Florida, 430 US 349, 358 (1977).

In addition to the lack of any definition of the term "substantial assistance" 893.135, Florida Statutes, leaves completely open the possibility that a State Attorney may refuse to move

the sentence in court or to reduce or suspend the sentence, even where the defendant's assistance is unquestionably substantial. (a-49). At no time during any state of the sentencing process is the defendant permitted an opportunity to be heard. Sentencing is obviously a critical state of any criminal proceeding and requires the right to counsel as well as other procedural safeguards guaranteed by the Fourteenth Amendment. Mempa v. Rhay, supra; Specht v. Patterson, supra.

In Benitez, supra, the Florida Supreme Court gave little attention to the due process challenges to the Statute disposing of the issue in a rather cursory fashion. Id. at page 518-19. The court, at page 518, described subsection (3) as a "post conviction form of plea bargaining" and therefore, the

court reasoned that the phrase "substantial assistance" could tollerate subjectivity to an extent which normally would be impermissible for penal statutes. (a-62). Additionally, the court further described Sub-section (3) as "a gratuitive sentence reduction offered to one already incarcerated." Id. at page 520. However, the court relied upon the defendant's ability to "invoke" and "elect" the benefits of sentence reduction or suspension in order to uphold the constitutionality of the Statute. Id. at 519-20. Such obvious contradiction can only be reconciled when the Statute is viewed in light of the objective of the legislature in crafting this statutory scheme. It was referred to as a "rubber hose" and a "weapon" to force convicted people to slave for the state in its war

against drug trafficking. (a-71)

Under Section 893.135(3) a defendant is required to plead guilty first in order to qualify as a "person who is convicted of a violation of this section" (a-71). Then he is completely at the mercy of both the prosecuting attorney and the sentencing judge, enither of whom is bound to any particular course of conduct or consideration for the defendant. The state attorney may or may not move the sentencing court for a reduction or suspension of sentence. The judge, after hearing the arresting agency, may or may not grant the motion. And the defendant, whose liberties rest on this double contingency or absolute prosecutorial and judicial discretion, may not withdraw his guilty plea even if the motion is not made or is made but not

granted. This statutory scheme obviously violates the principles of fundamental fairness embodies in the Fourteenth Amendment to the United States Constitution. See Marshall v. Jerico, supra.

III. CRUEL AND UNUSUAL PUNISHMENT

The definition of cruel and unusual punishment is not fixed at the understanding that prevailed in 1791,[5] but 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 US 86, 101 (1958). Thus, where the historic concern of the Eighth Amendment was to outlaw the use of torture and other

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[5]The history of the Eighth Amendment is reviewed in an appendix to the discenting opinion of Judge Oakes in Carmona v. Ward, 576 F. 2d 405, 425 (2nd Cir. 1978).

barbarisms, it is now generally accepted that a punishment is cruel and unusual if it is greatly disproportional to the severity of the crime for which it is imposed. Weems v. United States, 217 US 349 (1910). This principle has found increasing application to drug offenses.[6]

However, Florida's trafficking statute presents an acception to this principle.

The legislative debate on the trafficking bill reflects the controversy which erupted over the wisdom and effectiveness of mandatory sentences. Concern was voiced for the effects created by "assembly line" sentences unmatched to the individual

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[6]See annotation, Review for Excessiveness in Narcotics Cases, 55 ALR 3rd 812 (1974).

offender. (a-103) Supporters of the Bill squelched these protests with quick assurances that the mandatory sentences for trafficking would be different in that they were designed to compel defendants to become informants and not to be served full term. (a-80). As stated by Jim White, Assistant General Counsel to the Governor and drafter of the Bill:

> "The new laws method for producing informants was fool proof, except for its propensity to precipitate murder. When we're talking about taking a person and putting them in prison for fifteen years unless they cooperate, I don't know what inducement the major suppliers can make to that person to encourage him to stay in prison for fifteen years. Maybe they can try to kill him if he doesn't, but we've got that problem in every case." (

Regardless of Mr. White's prognosis, the issue here is the

constitutionally repugnant operation of this Statute by virtue of the interaction of Sub-sections (1) (2), and (3). These three Sub-sections, acting together, penalize those who refuse to render "substantial assistance" based upon a valid Fifth Amendment claim against self-incrimination, or based upon a lack of knowledge. The most distressing aspect of the Statute's sentencing scheme is its disproportionate infliction of punishment. See Coker v. Georgia, 433 US 584 (1977); Rummel v. Estelle, 445 US 263 (1980). The disproportionate punishment is inherent in the stated objective of the statute - to compel defendants to become informants.

The judicial guidelines that have evolved for determining whether a

statutory penalty constitutes cruel and unusual punishment are tipified by an analysis of such factors as the nature of the offense and/or the offender with particular regard to the degree of danger to society, a comparison of the challenged punishment with punishemnts imposed within the same jurisdiction for more serious offenses, and a comparison of the challenged punishment with penalties described in other jurisdictions for the same offense. See Rummel v. Estelle, supra; Coker v. Georgia, supra; In re Grant, 132 Cal. Rptr. 430 (1976). Taking the first consideration, it is clear that the challenged Statute completely ignores any consideration of the offender as an individual. On the contrary, the process is completely mechanical:

conviction triggers a mandatory minimum term of 3, 5, 10, 15 or 25 years, regardless of the individual characteristics of the defendant, has the effect of ignoring gradations of culpability and indiscriminately penalizing defendants who are not similarly situated.

The law utterly fails, for example, to distinguish between a petty street dealer and a large scale wholesaler of cocaine. Both will receive fifteen year minimum terms where the quantity exceeds the relatively small amount of 400 grams (less than 100 pounds). This is obviously in violation of the fundamental precept of our criminal justice system that sentencing and parole consideration should be tailored to fit the individual defendant.

Indeed, the individualized approach is mandated by Section 948.01(3) and Section 947.18, Florida Statutes (1977) for all offenses but two. Significantly, the two exceptions are crimes of violence, and crimes inherently dangerous to human life. They are capital felonies, mandatory penalty of twenty-five years in prison without parole where dealth sentence not imposed under Section 775.082(1) and certain offenses committed with a firearm (mandatory three years prison sentence under Section 775.087(2), Florida Statutes (1977). Even for a life felony or a first degree felony, the defendant remains eligible for probation or parole consideration. (a-52 - a-57) Only under Section 893.135(2) Florida Statutes (1979) are these alternatives denied. Therefore, this

Statute establishes a compulsory prison sentence of twenty-five years for a non-violent crime imposed without consideration of the defendant's individual personality and history and is therefore so excessive that it shocks the conscience.

Additionally, the mandatory minimum punishment is so crude in its application that it fails to distinguish between or among basic differences in culpability. Section 893.135(1)(a), (b) and (c) penalize equally one who "sells, manufactures, delivers or brings into this state, or who is knowingly in actual or constructive possession. . . ." of certain specified quantities of cannibas, cocaine and opiates respectively no distinction in the penalty is made according to

whether the defendant's involvement is manufacturing, delivery, possession, or sale. The only differences in penalty arise according to the quantity of cannibas, cocaine or opiates. Moreover, in that regard, 893.135(b) fails to distinguish between pure cocaine or "any mixture containing cocaine." Both are first degree felonies and carry the same penalty, yet, surely the degree of culpability is not the same for pure cocaine or a "mixture" containing trace amounts. (a-47 - a-48).

The net result of this gross, indiscriminate and absurd statutory scheme is a system of irrationality in terms of the penalties imposed. For example, possession in separate containers of 200 grams of cocaine and

200 grams of sugar would be punished under §893.135(1)(b)(2) with a mandatory minimum term of five calendar years. However, if the identical quantities of those two substances are mixed together in one container, the offense is dramatically escalated under §893.135(1)(b)(3) to carry a mandatory minimum term of 15 calendar years. The absurdity of this result, together with the exaggerated length of penalties imposed, strongly suggests that the punishment is disproportionate to the crime.[7]

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[7] As to the other objective factors traditionally considered by the court under an Eighth Amendment analysis, i.e., the danger to society, and the punishment imposed for the same offense in other jurisdictions and exhaustive survey in this jurisdictional brief is not necessary at this time. Florida legislators themselves described the trafficking statute as the toughest in the nation when it was enacted. Considering the mandatory penalties which are imposed automatically, with no attempt to fit the offender, that the penalties forbid adjustment by probation or parole to fit the offenders efforts at rehabilitation, no reason appears for not taking the lawmakers at their word.

Although the decision in Rummel v. Estelle, supra, raises certain questions as to whether the Eighth Amendment prohibition against cruel and unusual punishment would void a states enactment of any sentencing scheme unrelated to the death penalty, the scope of the Eighth Amendment remains to be explored. The question presentenced on this appeal has not been previously considered by this court and justice requires its determination.

CONCLUSION

This appeal challenges the constitutionality of a legislative scheme which was planned, designed and implemented with the unvarnished purpose of compelling criminal defendants to become informants at the expense of their constitutional right. Florida legislators, by enacting Section 893.135, Florida Statutes (1979) have radically altered the role and power of the prosecutor by placing in his hands the absolute and unfettered discretion to determine who has or has not provided "substantial assistance" thus triggering the possibility for sentence mitigation.

Moreover, the Statute imposes excessive, disporportionate mandatory sentences with no regard for the

defendant's particular circumstances and thereby removes all judicial discretion in sentencing. Again, at the expense of the defendant's constituional right, this draconian legislative scheme has been upheld by Florida's highest court. For the foregoing reasons and those set forth in the body of this brief, the questions presented by this appeal are substantial ones and this Court should note probable jurisdiction and set this case for full briefing and argument.

Respectfully submitted,
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Appendix

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT

CASE NO: 81-10

STATE OF FLORIDA,

Appellant,

vs.

STEVEN MICHAEL SMITH,

Appellee.

(September 2, 1981)

PER CURIAM.

The trial court's order of December 19, 1980, which declared Section 893.135, Florida Statutes (1979) to be unconstitutional and, thereupon, dismissed the information, is reversed upon the authority of State v. Benitez, 395 So.2d 514 (Fla. 1981).

REVERSED and REMANDED for further proceedings.

DOWNEY, GLICKSTEIN and HURLEY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Broward County, Stanton S. Kaplan, Judge.

Jim Smith, Attorney General, Tallahassee, and Robert Bogen, Assistant Attorney General, West Palm Beach,

for Appellant.

Bruce E. Wagner, Fort Lauderdale,

for Appellee.

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY,
FLORIDA

CASE NO: 80-8960CF

JUDGE KAPLAN

STATE OF FLORIDA

vs.

STEVEN MICHAEL SMITH

ORDER ON MOTION TO DISMISS

THIS CAUSE came on to be heard on the defendant's Motion to Dismiss, and the Court having reviewed the Motion, Memorandum of Law, and having heard argument of counsel, it is hereby

ORDERED AND ADJUDGED that F.S. 893.135 is declared unconstitutional and the above-styled case is hereby dismissed for the reasons more fully set out in this Court's Order of November 6, 1979, in the case of State v. Russell Leicht, Case No:

79-4954CF attached to this Order and incorporated herein by reference.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 19th day of December, 1980.

CIRCUIT COURT JUDGE

(S) STANTON S. KAPLAN

Copies furnished:

Bruce E. Wagner, P. A.
Office of the State Attorney

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY,
FLORIDA

CASE NO: 79-4954CF

JUDGE KAPLAN

STATE OF FLORIDA, Plaintiff

VS.

RUSSELL LEICHT, Defendant

ORDER DECLARING FLORIDA STATUTE 893.135, RELATING TO TRAFFICKING IN CONTROLLED SUBSTANCES UNCONSTITUTIONAL

THIS CAUSE came on to be heard upon the Defendant's Motion to Declare Florida Statute 893.135 unconstitutional. The Court having considered the Motion, the legal memoranda of Counsel for both sides, and having reviewed the case authorities presented the Court, hereupon finds that Subsection 3 of the Statute is unconstitutional

for the reasons to be expressed. The Court further finds that a voiding of Subsection 3 voids the entire Statute because the Sections of the Statute are so interdependent that that legislature would not have passed one without the other.

Subsection 3 provides:

> The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

A person is entitled to invoke

his privilege against self-incrimination where his words might furnish a single link in a chain of evidence connecting him to the commission of a crime. Malloy v. Hogan, 78 U.S.1 (1964).

The United States Supreme Court has concluded that no person may be penalized for asserting his privilege against self-incrimination. Thus, the Court has nullified the ouster of a public school teacher, Slochower v. Board of Education, 350 U.S. 351 (1956); has repudiated the disbarrment of an attorney, Spevack v. Klein, 385 U.S. 511 (1967); has revoked the suspension of a police officer, Garrity v. New Jersey, 385 U.S. 493 (1967); has overruled the removal from office of a public official, Perla v. New York, 392 U.S. 296 (1968); Lefkowitz v.

Cunningham, 431 U.S. 801 (1977); has rescinded the discharge of public employees where individuals were disciplined merely because they invoked their privilege against self-incrimination, Uniformed Sanitation Mens Association Inc. v. Commissioner of Sanitation, 392 U.S. 280 (1968); has forbidden the elimination of a contractor's right to do business with the state, Turley v. Lefkowitz, 414 U.S. 70 (1974).

In the Federal system judges have sought to punish silence and/or reward a confession or assistance to the government by a defendant, and have expressly stated that these factors will determine the sentence to be imposed. These sentences have been vacated as unconstitutionally coercive.

In Thomas v. United States, 368 F.2d 941 (5 CA 1966) the trial court

indicated that if the defendant would come clean and confess his guilt at sentencing, the court would take that into account in the length of the sentence to be imposed. Likewise, the court indicated, if the defendant persisted in his denial of wrongdoing, the court would take that into account. In vacating the sentence, the court held when the defendant received harsher punishment than the court would have decreed had he waived his right against self-incrimination, he paid an imposed penalty for exercising his constitutionally guaranteed right.

In United States v. Rodriguez, 498 F.2d 302 (5 CA 1974) the trial court stated it would have compassion on those defendants who confessed guilt, and would deal more harshly with those who remained silent. The court in reversing

emphatically stated that a defendant retains important Fifth Amendment Rights after a verdict, rights which must not be made the price of sentencing leniency. The court cannot place the defendant in the dilemma of either abandoning his right against self-incrimination or risking a harsher sentence.

In United States v. Rogers, 504 F.2d 1079 (5 CA 1974) in sentencing the defendant, the court stated the first step towards rehabilitation was to cooperate with the authorities in bringing others involved in the conspiracy to justice, and unless and until he indicated "substantial, material, productive cooperation" mitigation would not be forthcoming. In reversing the Court reasoned that in implicating his accomplices, accessories, and

co-conspirators, he was admitting his own complicity. Therefore, the defendant was again faced with the dilemma of abandoning his right against self-incrimination, or foregoing a reduction or suspension of his sentence.

In United States v. Garcia, 544 F.2d 681 (3 CA 1976) the trial court predicated leniency on the defendants assisting the government in reducing drug trafficking and there was no guarantee that if such information were forthcoming the defendants would not be subsequently indicted. The Court found the defendants were faced with a Hobson's choice: remain silent and lose the opportunity of leniency, or speak and run the risk of additional prosecution. The Court declared the price tag of waiving the protection

of the Fifth Amendment was too high and vacated the sentence.

Subsection 3 requires as a condition precedent to leniency, the defendant waiving his right against self-incrimination. "Substantial assistance" is defined as providing testimony which will lead to the identification, arrest or conviction of a defendant's accomplices, accessories, co-conspirators or principals. The very nature of the testimony sought requires a defendant to incriminate himself. Otherwise, they would not be his co-conspirators. The cooperating defendant who comes forward in good faith has no guarantee the testimony he gives will not form the basis for a future prosecution.

As stated in Rodriguez, supra, a defendant retains important Fifth Amendment Rights after a verdict. During

the pendency of an appeal, a defendant retains his right against self-incrimination. Should a cooperating defendant have his case reversed and remanded for a new trial, the Statute is silent as to whether he will be immunized for the testimony he provided, or whether that testimony may be used against him at his new trial.

Subsection 3 clearly places the defendant in the dilemma of either abandoning his privilege against self-incrimination, or being penalized by a higher sentence.

Subsection 3 provides the "state attorney" may petition the sentencing court for mitigation. The Statute does not speicifically state that a defendant may petition the court for mitigation. It is a general principle of statutory interpretation (i.e. expressio unius est

exclusio alterius) that the expression of one thing implies the exclusion of another. The wording of the Statute excludes the defendant from petitioning for mitigation.

The transcript of the hearing before the Florida House of Representatives, Committee on Criminal Justice reveals:

> Mr. Chairman: ". . . If they do not cooperate, if the State Attorney does not petition, it is mandatory. . . on the judge. He can only be relieved by petition from the state attorney." (TR page. 7)
>
> Representative Martinez: ". . .the state attorney has to be convinced that it's substantial and the state attorney has to file the petition, and the defendant doesn't have anything. . . His attorney can't come up and say hey court. . . that's all the man knows; He's out of the picture. It's just the state attorney and the law enforcement." (TR page 9-10)
>
> Mr. White (drafter of the Bill);

". . . I would hesitate in turning this substantial assistance into an adversary proceeding." (TR page 22-23)

"If you had it so that the defense attorney could file the motion, then he could initiate the proceedings that would be before the court without the state attorney ever passing on the substantial nature of the information. . ." (RT page 29)

At the Committee hearing, Representative Martinez attempted to amend the Bill to provide "standing" to the defendant to petition for mitigation. However, this was defeated. (TR page 40-43).

The transcript of the hearing on the Bill before the Florida Senate reveals the Bill shall provide that the state attorney may move for mitigation. (TR page 4)

The transcript of the hearing on the Bill before the Florida House of

Representatives reveals:

> ". . .I thought of amending so that (the defendant) will also be allowed to petition the court. . . let's not even give him that chance. . ." (TR page 5)

Representative Martinez attempted to amend the Bill on the floor to give the defendant "standing" to petition for mitigation. The amendment was defeated.

As reflected in the aforementioned comments, the legislature intended that only the state attorney should have "standing" to file the mitigation petition, and that the hearing would be non-adversary.

Generally, defendants have the right to initiate such proceedings (Fla. R.Crim.P. 3.800). This Statute precludes the person with the paramount interest in the outcome of the procceding

from initiating the action, or even being heard if a hearing is held.

The threshold determination of whether mitigation will be sought is solely in the discretion of the prosecutor. Once they cooperate, defendants have a vested interest in the proceedings. It is essential they be able to have the question of what constitutes "substantial assistance" litigated before a neutral magistrate.

Accordingly, the Court finds Subsection 3 denies the defendant access to the courts, and abridges his rights to due process of law as guaranteed by the United States and Florida Constitutions.

The Court recognizes that a statute may contain constitutional and unconstitutional sections, and that a partial invalidity of a statute does not

necessarily render the entire statute void. This Statute provides for severability. However, the Court finds the mere inclusion of a severability clause is not dispositive of the issue.

The transcript of the hearing before the House of Representatives Committee on Criminal Justice reveals:

> Representative Haben: "I am still opposed to mandatory minimum sentencing. . .I feel obligated to come down and explain to you why I'm supporting this particular measure." (TR page 3).
>
> ". . .I think this is not a pure mandatory minimum. It is. . . if you are caught. . .convicted. . . and chose not to aid and assist law enforcement." (TR page 4)
>
> ". . .he's not going to spend 15 years in Raiford he's going to turn state's evidence. So I think because of the fact that there is a way out, it is not a pure mandatory minimum. . ." (TR page 4)
>
> Mr. Gibson (Counsel to the Governor): "It . . . gives us a new tool . . . When the reality of (the penalty) sets in . . . you want to cooperate . . ."(TR page 36).

The transcript of the hearing before the Florida Senate Committee reveals:

> Senator Spicola: "Then the whole incentive, the whole object of the Bill to make him cooperate . . ." (TR page 24)

> Senator Steinberg: "If these people feel they're not going to get out for a period of time . . .(then they'll cooperate). That is what the Bill does." (TR page 30).

The transcript of the hearing on the Bill on the floor of the Senate reveals:

> "The reason for the Bill is to make the penalty stiff enough that. . . when he hears that door slam. . . for 3 to 25 years, (he's going to cooperate)." (TR page 4).

The transcript of the hearing on the Bill on the floor of the House reveals:

> ". . .the real thrust of this thing is to try and make sure. . . the prosecution has enough of a hammer over a person's head to make them talk." (TR page 4)

Based on the foregoing, the Court finds the mandatory minimum sentence provisions and the mitigation provision are so interdependent that the legislature would not have passed one without the other. It is clear that the purpose of the mandatory minimum sentences was to give law enforcement officials leverage to force cooperation.

WHEREFORE, the Court finds that Florida Statute 893.135 is unconstitutional.

DONE AND ORDERED at Fort Lauderdale, Florida this 6th day of November, 1979.

CIRCUIT COURT JUDGE

(S)STANTON S. KAPLAN

Copies furnished:
Jeffry Driscoll, Asst. State Attorney
H. Dohn Williams, Esquire

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT

CASE NO: 81-10

STATE OF FLORIDA,

Appellant,

vs.

STEVEN MICHAEL SMITH,

Appellee.

(September 2, 1981)

PER CURIAM.

The trial court's order of December 19, 1980, which declared Section 893.135, Florida Statutes (1979) to be unconstitutional and, thereupon, dismissed the information, is reversed upon the authority of State v. Benitez, 395 So.2d 514 (Fla. 1981).

REVERSED and REMANDED for further proceedings.

DOWNEY, GLICKSTEIN and HURLEY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Broward County, Stanton S. Kaplan, Judge.

Jim Smith, Attorney General, Tallahassee, and Robert Bogen, Assistant Attorney General, West Palm Beach,

for Appellant.

Bruce E. Wagner, Fort Lauderdale,

for Appellee.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT

CASE NO: 81-10

STATE OF FLORIDA

vs.

STEVEN MICHAEL SMITH

September 24, 1981

BY ORDER OF THE COURT:

ORDERED that Appellee's September 14, 1981 Motion for Rehearing is denied.

I hereby certify the foregoing is a true copy of the original court order.

(S)CLYDE L. HEATH,
CLERK

cc: Bruce Wagner, Esq.
Attorney General

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT

CASE NO: 81-10

STATE OF FLORIDA,

Appellant,

vs.

STEVEN MICHAEL SMITH,

Appellee,

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that STEVEN MICHAEL SMITH, Appellee, appeals to the Supreme Court of the United States from the judgment entered in this action in favor of the Appellant on September 2, 1981, rehearing denied on September 24, 1981. This appeal is taken pursuant to 28 U.S.C. §1257(2).

I HEREBY CERTIFY that a copy of

the foregoing has been furnished to CLYDE L. HEATH, Clerk of the District Court of Appeal of the State of Florida, Fourth District, Post Office Box A, West Palm Beach, Florida 33402; STEWART J. BELLUS, Assistant Attorney General, Department of Legal Affairs, Office of the Attorney General, Tallahassee, Florida 32301; Clerk of the Circuit Court, Criminal Division, Broward County Courthouse, 201 Southeast 6th Street, Fort Lauderdale, Florida 33301.

(S)BRUCE E. WAGNER
1520 S.E. 3rd Ave.
Ft. Lauderdale, FL 33316
305/467-2602

Attorney for Appellant

(Served: Nov. 13, 1981)
(Filed: Nov. 13, 1981)

IN THE CIRCUIT COURT
OF THE 17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO: 80-8960CF

STATE OF FLORIDA

Plaintiff,

vs.

STEVEN MICHAEL SMITH

Defendant.

MOTION TO DISMISS

COMES NOW, the Defendant, STEVEN MICHAEL SMITH, by and through his undersigned counsel, and moves this Honorable Court to dismiss the above-styled prosecusion and as grounds therefore would state:

1. That the Defendant is charged via Information filed with the statutory offenses of Count I, trafficking in cocaine contrary to Florida Statute 893.135(1)(b)(2); Florida Statute 893.03(2)(a)4; and, Florida

Statute 893.13(1)(a)(1).

2. That the underlying statutes upon which the above charges are founded were most recently enacted by the legislature and approved by the Governor on April 6, 1979, per Chapter 79-1.

3. That the said legislation is unconstitutional as violative of the Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 2, 9 and 17 and Article II, Section 3 of the Constitution of the State of Florida.

4. That Chapter 79-1 purports to create certain penalties including mandatory fines and mandatory minimum terms of incarceration, for the possession and/or delivery of certain controlled substances; that said legislation further contains a provision for the reduction or suspension of said sentences;

that the overall gist of said legislation is to coerce and/or otherwise force criminal defendants into cooperating with the State Attorney in order to avoid the prescribed mandatory minimum terms of imprisonment; that as set forth, the provisions for mandatory incarceration and reduction and/or suspension of sentences are interrelated and were purposefully designed to facilitate interaction; because said statutes govern different facets of the same subject matter they must be read in pari materia under accepted rules of statutory constitution. Wooten v. State, 322 So.2d 15 (Fla. 1976).

5. That Florida Statute 893.135(3) is fatally defective for vagueness in that said section allows for reduction or suspension of sentence only upon defendant

"substantial assistance in the identification, arrest or conviction of any of his accomplices, accessories, co-conspirators, or principals"; that said term "substantial assistance" is in no way defined or is it capable of common understanding or definition. See, Papachristov v. City of Jacksonville, 92 S.Ct. 893 (1972).

6. That Florida Statute 893.135(3) is further fatally defective in that it usurps judicial power by allowing only for the reduction or suspension of sentences upon motion of the State Attorney; that in effect the Court is without power to exercise any discretion regarding reduction or suspension of sentence without prior approval of the State Attorney.

7. That the mandatory minimum and maximum penalties as set forth in Florida

Statute 893.135(1)(b) regarding cocaine are unconstitutional in that they constitute cruel and unusual punishment; that the minimum mandatory sentence of three years and maximum of thirty years for possession of cocaine in excess of 28 grams, but less than 200 grams, is absolutely absurd in light of the penalties for violent crimes in Florida such as aggravated assault (5 years maximum), vehicular manslaughter (5 years maximum), aggravated battery (15 years maximum) and third degree murder (15 years maximum). See, Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975); In Re: Foss, 519 P.2d 1073 (1974).

8. That Florida Statute 893.135(2) is an encroachment by the legislature upon an inherent power of the judiciary violative of the Separation of Powers Doctrine; said section purports to prohibit the

Court from withholding adjudication of guilt of imposition of sentence; the subject of withholding adjudication of guilt and/or imprisonment of sentence is a matter appropriate only for court rule; the Florida Legislature in passing Florida Statute 893.135 has encroached upon an inherent power of the judicial branch in violation of the Florida Constitution. State v. Smith and Figgers, 260 So.2d 489 (Fla. 1972); that further the requirement that offenders be adjudged guilty is not part of any legislative scheme embracing multiple offenders and enhanced punishment in which the legislature might have some legitimate interest. See, Wooten v. State, supra. Additionally, there is present no court rule which could breathe life into the legislative act which, absent such a rule, remains only a declara-

tion of legislative policy and nothing more. See, State v. Smith, supra.

WHEREFORE, Defendant moves this Honorable Court to dismiss the above-styled prosecution.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, Broward County Courthouse, 201 Southeast Sixth Street, Fort Lauderdale, Florida 33301, this 4th day of November, 1980.

(s) BRUCE E. WAGNER, P.A.
1520 S.E. 3rd Avenue
Fort Lauderdale, Fl.
33316
Phone: (305) 467-2602

Attorney for Defendant

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH
DISTRICT

CASE NO: 80-8960CF10

STATE OF FLORIDA,

Plaintiff/Appellant,

vs.

STEVEN MICHAEL SMITH,

Defendant/Appellee.

N O T I C E

NOTICE IS HEREBY GIVEN that the State of Florida, Plaintiff/Appellant, appeals the Fourth District Court of Appeal, State of Florida, the final Order granting Defendant's Motion to Dismiss in the above-styled cause signed and rendered on December 19, 1980.

MICHAEL J. STAZ
State Attorney
17th Judicial Circuit of Fl.

(S)PAUL H. ZACKS
Assistant State Attorney
640 Broward County Courthouse
Fort Lauderdale, Fl. 33301

Telephone: 765-8144
Counsel for Plaintiff/
Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to Bruce Wagner, 524 South Andrews Ave., Fort Lauderdale, Florida, 33301, this 30th day of December, 1980.

(s) PAUL H. ZACKS

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT

CASE NO: 81-10

STATE OF FLORIDA,

Appellant,

vs.

STEVEN MICHAEL SMITH,

Appellee.

MOTION SEEKING ORDER TO SHOW CAUSE
WHY APPEAL SHOULD NOT BE
SUMMARILY REVERSED

Appellant, the State of Florida, hereby moves this Honorable Court to issue an Order to Show Cause why the instant appeal should not be summarily reversed and remanded to the trial court. As grounds in support of its Motion, Appellant states:

1. The sole issue on this appeal, as in State v. Benitez, FSC Case No. 57,834, is the constitutionality of §893.135, Fla. Statutes, Florida's

Trafficking Statute.

2. On February 12, 1981, the Trafficking Statute was declared constitutional. 81 Florida Law Weekly 127.

WHEREFORE, Appellant respectfully requests that this Honorable Court issue an Order to Show Cause why the instant appeal should not be reversed.

JIM SMITH
Attorney General
Tallahassee, FL 32304

(S)STEWART J. BELLUS
Assistant Attorney General
111 Georgia Avenue
Room 204
West Palm Beach, FL 33401
305/837-5062

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bruce Wagner, Esquire, 524 South Andrews Avenue, Fort Lauderdale, Florida 33301, this 27th day of February, 1981.

(S)STEWART J. BELLUS

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT

CASE NO. 81-10

STATE OF FLORIDA,

Appellant,

vs.

STEVEN MICHAEL SMITH,

Appellee.

July 29, 1981

BY ORDER OF THE COURT:

ORDERED that Appellee is directed to show cause why the instant appeal should not be summarily reversed and remanded to the lower tribunal, in accordance with State of Florida v. Benitez, Supreme Court of Florida Case No. 57,834, opinion filed February 12, 1981. Appellee shall respond to this order within twenty (20) days.

I hereby certify the foregoing is a true copy of the original court order.

(S)CLYDE L. HEATH,
CLERK

cc: Bruce Wagner, Attorney
Stewart J. Bellus, Assistant Attorney General

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FOURTH DISTRICT

CASE NO: 81-10

STATE OF FLORIDA,

Appellant,

vs.

STEVEN MICHAEL SMITH,

Appellee,

APPELLEE'S RESPONSE TO
ORDER TO SHOW CAUSE

COMES NOW, the Appellee, STEVEN MICHAEL SMITH, by and through his undersigned counsel, pursuant to FL.a. R. App. p. 9.300(a) and files his response to this Court's Order to Show Cause why the instant appeal should not be summarily reversed and remanded to the lower tribunal and states the following:

1. In State of Florida v. Benitez, Case No. 57,834, the Supreme Court of Florida did not address all of the

constitutional issues raised by the defendant in the instant case. More particularly, the Supreme Court did not address the issue of whether F.S. 893.135 is unconstitutional in that it creates an irrebuttable presumption in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. The instant appeal is not controlled by the Florida Supreme Court decision in State of Florida v. Benetiz in that in the instant case the defendant was charged with trafficking in cocaine. The Benetiz decision does not deal with the constitutionality of F.S. 893.135 as it would apply to a violation of the statute based on the sale or possession of cocaine in varying quantities or mixtures.

3. The foregoing are issues which

were properly raised in the Appellee in the lower court.

4. Based upon the foregoing, the appellee maintains that the State of Florida vs. Benetiz, Case No. 57,834 is not ultimately controlling in the instant case and therefore this court should not summarily reverse and remand this appeal.

I HEREBY CERTIFY that a copy hereof has been furnished to: STEWART J. BELLUS, Assistant Attorney General, Fourth District Court of Appeals, Post Office Box "A", West Palm Beach, Florida 33402, this 12th day of August, 1981.

(S)BRUCE E. WAGNER
1520 Southeast 3rd Avenue
Fort Lauderdale FL 33316
305/467-2602

Attorney for Appellant

CONSTITUTION OF THE UNITED STATES
AMENDMENTS

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

RATIFIED DECEMBER 18, 1865.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OFFICIAL FLORIDA STATUTES (1979)
CH. 893-DRUG ABUSE PREVENTION AND CONTROL

893.03 Standards and schedules.-The substances enumerated herein are controlled by this chapter. The controlled substances listed or to be listed in Schedules I, II, III, IV, and V are included by whatever official, common, usual, chemical, or trade name designated. The provisions of this act shall not be construed to include within any of the schedules herein contained any Excepted Prescription Drugs listed within the purview of 21 C.F.R. s 1308.32, styled "Excepted Compounds."

(1) SCHEDULE I.-A substance in Schedule I has a high potential for abuse and has no currently accepted medical use in treatment in the United States, and in its and in its use under medical supervision does not meet accepted safety standards except for such uses provided

for in s. 402.36. The following substances are controlled in Schedule I:

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances or which contains any of their salts, isomers, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. 4-Bromo-2, 5-dimeth xyamphetamine.
2. Bufotenine.
3. Cannabis.
4. Diethyltryptamine.
5. 2,5-Dimethoxyamphetamine.
6. Dimethyltryptamine.
7. N-Ethyl-3-piperidyl benzilate.
8. Iboganine.
9. Lysergic Acid Diethylamide.
10. Mecloqualone.
11. Mescaline.
12. 4-methoxyamphetamine.
13. 5-Methoxy-3, 4-methylenedioxyamphetamine.
14. 4-Methyl-2, 5-dimethoxyamphetamine.
15. 3, 4-Methylenedioxyamphetamine.
16. N-Methyl-3-piperidyl benzilate.
17. Peyote.
18. Psilocybin.
19. Psilocyn.
20. Tetrahydrocannabinols.
21. Thiophene Analog of Phencyclidine.
22. 3, 4, 5-Trimethoxyamphetamine.

(2) SCHEDULE II.-A substance in Schedule II has a high potential for abuse and has a currently accepted by severly restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence. The following substances are controlled in Schedule II:

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis:

• • • •

4. Coca leaves, cocaine, or ecgoine, and any salt, compound, derivative, or preparation of coca leaves, cocaine, or ecgonine, and any salt, compound, derivative, or preparation thereof which is chemically equivalent to or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

• • • •

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which containes any quantity of the following substances, including their salts, isomers, opital isomers, salts of their isomers, and salts of their optical isomers:

1. Amphetamine.
2. Methamphetamine.
3. Phenmetrazine.
4. Methylphenidate.
5. Methaqualone.
6. Amobarbital.
7. Secobarbital.
8. Pentobarbital.
9. Phencyclidine.

• • • •

893.13 Prohibited acts; penalties.-

(1)(a) Except as authorized by this chapter and chapter 500, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:

1. A controlled substance named or described in s. 893.03(1) (a). (1) (b), (2) (a), or (2) (b) is guilty of a felony of the third degree, punishable as provided in s. 775.082, 775.083, and 775.084.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c), (3), or (4) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084; except that the sale, delivery, or possession of in excess of 100 pounds of canabis as controlled in s. 893.03(1)(c) shall be punisable as provided in s. 893.135.

(e) It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision is guilty of a felony of the third degreee, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(f) If the offense is the possession or delivery without consideration of not more than 20 grams of cannabis, as defined in this chapter, that person shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 and s. 775.083. For purposes of this subsection, "cannabis" shall not include the resin extracted from the plants of the genus *Cannabis*, or any compound manufacture, salt, derivative, mixture, or preparation of such resin.

893.135 Trafficking; mandatory sentences; suspension or reduction of sentences.-

(1) Except as authorized in this chapter or in chapter 500:

(a) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 100 pounds of cannabis is guilty of a felony of the first degree, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved:

1. Is in excess of 100 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $25,000.

2. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $50,000.

3. Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $200,000.

(b) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, as described in s. 893.03(2)(a), is guilty of a felony of the first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(c) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance, is guilty of a felony of the first degree, which felony shall be known as "trafficking in illegal drugs." If the quantity involved:

1. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 10 calendary years and to pay a fine of $100,000.

3. Is 28 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and to pay a fine of $500,000.

(2) Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this sention, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, not shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

DEFINITIONS; GENERAL PENALTIES; REGISTRATION OF CRIMINALS

775.082 Penalties.-

(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Cout or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

(3) A person who has been convicted of any other designated felony may be punished as follows:

(a) For a life felony, by a term of imprisonment for life or for a term of years not less than 30;

(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by improsonment for a term of years not exceeding life imprisonment;

(c) For a felony of the second degree, by a term of imprisonment not exceeding 15 years;

(d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For amisdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

775.083 Fines.-

(1) A person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine in addition to any punishment described in s.

775.082; when specifically authorized by statute, he may be sentenced to pay a fine in lieu of any punishment described in s. 775.082. A person who has been convicted of a noncriminal violation may be sentenced to pay a fine. Fines for designated crimes and for noncriminal violations shall not exceed:

(a) $15,000, when the conviction is of a life felony.

(b) $10,000, when the conviction is of a felony of the first or second degree.

(c) $5,000, when the conviction is of a felony of the third degree.

(d) $1,000, when the conviction is of a misdemeanor of the first degree.

(e) $500, when the conviction is of a misdemeanor of the second degree or a noncriminal violation.

(f) Any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.

(g) Any higher amount specifically authorized by statute.

CH. 947 - PAROLE AND PROBATION

947.18 - CONDITIONS OF PAROLE

NO PERSON SHALL BE PLACED ON PAROLE MERELY AS A REWARD FOR GOOD CONDUCT OR EFFICIENT PERFORMANCE OF DUTIES ASSIGNED IN PRISON. NO PERSON SHALL BE PLACED ON PAROLE UNTIL AND UNLESS THE COMMISSION SHALL FIND THAT THERE IS REASONABLE PROBABILITY THAT, IF HE IS PLACED ON PAROLE, HE WILL LIVE AND CONDUCT HIMSELF AS A RESPECTABLE AND LAW-ABIDING PERSON AND THAT HIS RELEASE WILL BE COMPATIBLE WITH HIS OWN WELFARE AND THE WELFARE OF SOCIETY. NO PERSON SHALL BE PLACED ON PAROLE UNLESS AND UNTIL THE COMMISSION IS SATISFIED THAT HE WILL BE SUITABLY EMPLOYED IN SELF-SUSTAINING EMPLOYMENT, OR THAT HE WILL NOT BECOME A PUBLIC CHARGE. THE COMMISSION SHALL DETERMINE THE TERMS UPON WHICH SUCH PERSONS SHALL BE GRANTED PAROLE. IN ADDITION TO ANY OTHER LAWFUL CONDITION OF PAROLE, THE

THE COMMISSION MAY MAKE THE PAYMENT OF THE DEBT DUE AND OWING TO THE STATE UNDER §960.17 A CONDITION OF PAROLE, SUBJECT TO MODIFICATION BASED ON CHANGE OF CIRCUMSTANCES.

CH. 948 - PROBATION

948.01- WHEN COURTS MAY PLACE DEFENDANT ON PROBATION

(1) ANY COURT OF THE STATE HAVING ORIGINAL JURISDICTION OF CRIMINAL ACTIONS, WHERE THE DEFENDANT IN A CRIMINAL CASE HAS BEEN FOUND GUILTY BY THE VERDICT OF A JURY OR HAS ENTERED A PLEA OF GUILTY OR A PLEA OF NOLO CONTENDERE OR HAS BEEN FOUND GUILTY BY THE COURT TRYING THE CASE WITHOUT A JURY, EXCEPT FOR AN OFFENSE PUNISHABLE BY DEATH, MAY AT A TIME TO BE DETERMINED BY THE COURT, EITHER WITH OR WITHOUT AN ADJUDICATION OF THE GUILT OF THE DEFENDANT, HEAR AND DETERMINE THE QUESTION OF THE

PROBATION OF SUCH DEFENDANT.

(2) WHEN THE PENALTY FOR THE OFFENSE MAY INVOLVE IMPRISONMENT IN THE STATE PRISON, THE CIRCUIT COURT, PRIOR TO SUCH HEARING, SHALL, AND IN MISDEMEANOR CASES MAY, REFER THE CASE TO THE DEPARTMENT OF CORRECTIONS FOR INVESTIGATION AND RECOMMENDATION. THE COURT, UPON SUCH REFERENCE, SHALL DIRECT THE DEPARTMENT, AND IT SHALL BE THE DUTY OF THE DEPARTMENT, TO MAKE AN INVESTIGATION AND REPORT IN WRITING AT A SPECIFIED TIME PRIOR TO SENTENCING TO THE COURT UPON THE CIRCUMSTANCES OF THE OFFENSE, THE CRIMINAL RECORD, THE SOCIAL HISTORY, AND THE PRESENT CONDITION OF THE DEFENDANT, TOGETHER WITH ITS RECOMMENDATION PURSUANT TO THE PROVISIONS OF §921.231.

(3) IF IT APPEARS TO THE COURT UPON A HEARING OF THE MATTER THAT THE DEFENDANT IS NOT LIKELY AGAIN TO ENGAGE IN A CRIMINAL

COURSE OF CONDUCT AND THAT THE ENDS OF JUSTICE AND THE WELFARE OF SOCIETY DO NOT REQUIRE THAT THE DEFENDANT SHALL PRESENTLY SUFFER THE PENALTY IMPOSED BY LAW, THE COURT, IN ITS DISCRETION, MAY EITHER ADJUDGE THE DEFENDANT TO BE GUILTY OR STAY AND WITHHOLD THE ADJUDICATION OF GUILT, AND IN EITHER CASE STAY AND WITHHOLD THE IMPOSITION OF SENTENCE UPON SUCH DEFENDANT, AND SHALL PLACE HIM UPON PROBATION UNDER THE SUPERVISION AND CONTROL OF THE DEPARTMENT FOR THE DURATION OF SUCH PROBATION. AND THE DEPARTMENT SHALL THEREUPON AND THEREAFTER, DURING THE CONTINUANCE OF SUCH PROBATION, HAVE THE SUPERVISION AND CONTROL OF THE DEFENDANT. HOWEVER, NO DEFENDANT PLACED ON PROBATION FOR A MISDEMEANOR SHALL BE PLACED UNDER THE SUPERVISION OF THE DEPARTMENT UNLESS THE COURT AFFIRMATIVELY AND SPECIFICALLY ORDERS SUCH SUPERVISION AFTER FINDING THAT SUPERVISION IN THE COMMUNITY IS NECESSARY TO

PROVIDE ADEQUATE PROTECTION TO THE COMMUNITY (OR) TO ASSIST IN THE REHABILITATION OF THE OFFENDER, OR BOTH.

(4) WHENEVER PUNISHMENT BY IMPRISONMENT FOR A MISDEMEANOR OR A FELONY, EXCEPT FOR A CAPITAL FELONY, IS PRESCRIBED, THE COURT, IN ITS DISCRETION, MAY, AT THE TIME OF SENTENCING, DIRECT THE DEFENDANT TO BE PLACED ON PROBATION UPON COMPLETION OF ANY SPECIFIED PERIOD OF SUCH SENTENCE. IN SUCH CASE, THE COURT SHALL STAY AND WITHHOLD THE IMPOSITION OF THE REMAINDER OF SENTENCE IMPOSED UPON THE DEFENDANT, AND DIRECT THAT THE DEFENDANT BE PLACED UPON PROBATION AFTER SERVING SUCH PERIOD AS MAY BE IMPOSED BY THE COURT.

(5) IN NO CASE SHALL THE IMPOSITION OF SENTENCE BE SUSPENDED AND THE DEFENDANT THEREUPON PLACED ON PROBATION UNLESS SUCH DEFENDANT BE PLACED UNDER THE CUSTODY OF THE

DEPARTMENT, SALVATION ARMY, OR OTHER PUBLIC OR PRIVATE ENTITY.

(6) WHEN THE COURT, UNDER ANY OF THE FOREGOING SUBSECTIONS, PLACES THE DEFENDANT ON PROBATION, IT MAY SPECIFY THAT THE DEFENDANT SERVE ALL OR PART OF THE PROBATIONARY PERIOD IN A COMMUNITY RESIDENTIAL FACILITY UNDER THE JURISDICTION OF THE DEPARTMENT OF CORRECTIONS OR THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OR OWNER OR OPERATED BY THE SALVATION ARMY OR ANY PUBLIC OR PRIVATE ENTITY PROVIDING SUCH SERVICES, AND IT SHALL REQUIRE THE PAYMENT PRESCRIBED IN §945.30.

STATE of Florida, Appellant,
v.
Carlos M. BENITEZ and Esperanza Benitez,
Appellees.
No. 57834.

Supreme Court of Florida.

Feb. 12, 1981.

Rehearing Denied April 13, 1981.

Jim Smith, Atty. Gen., and Calvin L. Fox, Asst. Atty. Gen., Miami, and Janet Reno, State Atty., and Arthur Joel Berger, Asst. State Atty., Miami, for appellant.

Joseph Beeler, and Brian Richard McComb, Miami, for appellees.

Philip Carlton, Jr. of the Law Offices of Philip Carlton, Jr., Miami, for Daniel Cowgill, amicus curiae.

ENGLAND, Justice.

This case comes to us on direct appeal from a trial court order determining that section 893.135, Florida Statutes (1979) - Florida's newly-enacted "drug trafficking" statute - is unconstitutional.

After Carlos and Esperanza Benitez attempted to sell one kilo of cocaine to undercover narcotics agents for $44,000, they were charged by information with "trafficking in cocaine" in violation of section 893.135. In ruling on motions to dismiss the charges, the trial court entered a lengthy order declaring section 893.135 to be facially invalid on a multiplicity of grounds. The state appeals that order, urging error in each of the trial court's ruling.

Section 893.135 is a unique response to a serious and growing concern of the legislature regarding illegal drug activities in the State of Florida. Subsection (1) of the new law establishes severe mandatory minimum sentences for trafficking in various types of illegal drugs.

Subsection (2) prevents the trial court from suspending, deferring or withholding the adjudication of guilt or the imposition of sentence on a person convicted under the law, and it eliminates the defendant's eligibility for parole during the minimum mandatory sentence. Subsection (3) provides an "escape valve" from the statute's rigors, based on the initiative of the prosecuting attorney, by permitting the court to reduce or suspend a sentence if a convicted defendant is willing to cooperate with law enforcement authorities in the detection or apprehension of others involved in drug trafficking.

Section 893.135 was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from the importer-organizer down to the "pusher" on the street. The harsh mandatory penalties of subsection (1), ameliorated by the prospect of leniency in subsection (3), were clearly calculated to provide a strong incentive for drug violators to cooperate with law enforcement authorities and become informers. No one argues that the elimination of illegal drug traffic is not a beneficial and worthwhile goal, or that the goals of this legislation are not meritorious.

Nonetheless, in their zeal to combat the flow and distribution of illegal drugs through this novel legislation, legislators knowingly glossed over alleged constitutional defects in the approach that was being developed. We in the judiciary do not have that luxury. Indeed, the trial judge's extensive and detailed order exhibits the multiple, serious difficulties which this statute poses under well-established constitutional principles. We discern six major challenges to the constitutionality of section 893.135, one directed at the mandatory penalties and five directed at the escape valve in subsection (3). The state also half-heartedly challenges the appellees' standing for the first time on this appeal. This last challenge being the easiest to treat, we discuss it first.

1. Standing

The basic rule governing the standing of parties challenging statutory enactments was recently stated in *Sandstrom v. Leader*, 370 So. 2d 3, 4, (Fla. 1979):

> Fundamental constitutional principles dictate that one may not challenge those portions of an enactment which do not adversely affect his personal or property rights. . . Such a personal stake in the outcome of the controversy is necessary "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" (citations omitted).

The state argues that, because appellees have not yet been convicted, they have no personal stake in this penalty-oriented statute.

To state the assertion is to demonstrate its absurdity. A party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries. This is wholly unlike cases in which criminal defendants have challenged portions of a statute which have nothing to do with their prosecution. *See State v. Millington*, 377 So.2d 685 (Fla.1979); *State v. Champe*, 373 So.2d 874 (Fla.1978).

2. *Cruel and Unusual Punishment*

Appellees argue that the mandatory minimum sentences of section 893.135(1) violate the cruel and unusual punishment clauses of the state[1] and federal[2] constitutions. Relying on various death penalty decisions of the United States Supreme Court,[3] they first contend that the mandatory minimum sentences uncontitutionally eliminate the exercise of discretion in sentencing. This argument was rejected by this Court in *McArthur v. State*, 351 So.2d 972 Fla.1977), and warrants no further discussion here.

1. Art. 1, § 17, Fla.Const.
2. U.S.Const. amend. VIII.
3. *Lockett v. Ohio*, U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.3d 974 (1976).

Appellees also argue that the mandatory sentences in section 893.135 constitute cruel and unusual punishment since they are unnecessarily severe and disproportional to the nature of the crime. This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. *See, e. g., McArthur v. State,* 351 So.2d 972 (Fla.1077); *Banks v. State,* 342 So.2d 469 (Fla.1976); *ODonnell v.state*, 326 So.2d 4 (Fla.1975). The dominant theme which runs through these decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case-wherein the sentence was *grossly* disproportionate to the severity of the crime-the legislature's judgement would run afoul of the constitutional prohibition, this Court has never addressed such a situation in the context of statutory sentencing minima.

The recent decision of the United States Supreme Court in *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), indicates that similar considerations prevail under the federal constitution. In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment under the eight amendment. the majority's analysis of this area noted that:

> [t]his Court has on occasion stated that the Eight Amendment prohibits imposition of a sentence which is grossly disproportionate to the severity of the crime.... In recent years this proposition has appeared most frequently in opinions dealing with the death penalty.... Because a sentence of death differs in kind form any sentence of imprisonment, not matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to

Rummel.

> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.

Id., 445 U.S. at 271, 100 S.Ct. at 1138 (citations omitted). After analyzing one of these rare successful challenges, *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), the majority concluded:

> Given the unique nature of the punishments considered in *Weems* and in the death-penalty cases, one could argue without fear of contradiction by and decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Id., 445 U.S. at 273, 100 S.Ct. at 1139 (footnote omitted).

The penalties imposed by section 893.135 are certainly severe, but they are by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved. *See McArthur v. State*; *O'Donnell v. State*; *accord, People v. Broadie,* 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338, *cert. denied,* 423 U.S. 950, 96 S.Ct. 372, 46 L.Ed.2d 287 (1075).

3 *Due Process-Vagueness*

Little discussion is needed concerning appellees' suggestion that subsection (3) is impermissibly vague in defining a convicted defendant who is eligible for lenient treatment as "any person ... who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." Being a description of a *post-conviction* form of plea bargaining rather that a definition of the crime itself, the phrase "substantial assistance" can tolerate subjectivity to an extent which normally would be impermissible for penal statutes. *Cf. Linville v. State,* 359 So.2d 450 (Fla.1978) (statutory definition of proscribed activity held

unconstitutionally vague). The contested phrase, in any event, is susceptible of common understanding in the context of the whold statute. *Schultz v. State*, 361 So.2d 416 (Fla.1978). There is no due process infirmity.

4. *Equal Protection*

Appellees' suggestion that subsection (3) denies equal protection of the law to convicted defendants who cannot provide "substantial assistance" to law enforcement officials is patently without merit. This legislation manifestly passes the rational basis test. *See Hamilton v. State*, 366 So.2d 8 (Fla.1978).

5. *Separation of Powers*

Two basic arguments by appellees are directed at Florida's constitutional separation of governmental powers. Art. II, § 3, Fla.Const. First, they assert that subsection (3) encroaches on the Court's rulemaking role, Art. V, § 2(a), Fla.Const., in that it conflicts with Rule 3.800(b), Rule 3.720(b), and Rule 3.171 of the Florida Rules of Criminal Procedure. The statute differs from these rules, of course, but it in no way so conflicts with them as to offend the constituttion.

Rule 3.800(b) permits the reduction of legal sentences, yet since it specifically excludes minimum mandatory sentences from its operation, its procedures obviously are not incompatible with section 893.135. Likewise, Rules 3.720(b) and 3.171 do not pose any obstacle to the operation of section 893.135. Rule 3.720(b) provides that at a sentencing hearing, the court shall "[e]ntertain submissions and evidence by the parties which are relevant to the sentence...." Subsection (3) states that "[t]he arresting agency shall be given and opportunity to be heard in aggravation or mitigation in reference to any [motion for reduction or suspension of sentence]." The statute does not explicitly exclude the defendant from submitting evidence in his behalf, and it does not offend the

statutory scheme to afford him that right. Finally, applicable procedural safeguards in Rule 3.171 can be afforded to defnedants, to the extent they do not conflict with the explicit language of subsection (3). No infirimity of constitutional dimension attends the omission of those that do.

Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection (3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the *final* discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." *People v. Eason*, 40 N.Y.2d 297, 301, 386 N.Y.S.2d 673, 676, 353, N.E.2d 587, 589 ')1976) (emphasis in original) (rejecting a separation of powers attack on a similar provision in New York's drug laws).

6. *Self-incrimination*

Finally, the appellees argue that section 893.135 coerces a defendant into relinquishing his fifth amendment privilege against self-incrimination by denying him sentencing leniency unless he cooperates with the authborities. We reject this argument, primarily because it depends on unwarranted assumptions about the nature of the informer's disclosures. Nothing in the statute suggests that "substantial assistance" must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no fifth amendment privilege is obviously necessary). We acknowledge the risk of prosecution in other jurisditions. Nonetheless, a defendant need not invoke subsection (3), as nothing in the statue is compulsive. Putting a defendant to a difficult choice is not necessarily

forbidden by the fifth amendment. *See, e.g., Corbitt v. New Jersey,* 439 U.S. 212, 218, 99 S.Ct. 492, 497, 58 L.Ed.2d 466 (1978) ("N]' of every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." (footnote omitted)); *Bordenkircher v. Hayes,* 434 U.S. 357, 98 S.Ctg. 663, 54 L.Ed.2d 604 (1978); *zmcGautha v. California,* 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). No constitutional deprivation results if a defendant elects to reap the benefits of subsection (3).

With respect to those cases which say that the trial courts may not enhance a sentence based on a defendant's failure to cooperate with the authorities, *see United States v. Garcia,* 544 F.2d 681 (3rd Cir. 1976); *United States v. Acosta,* 501 F.2d 1330 (5th Cir. 1974) (Gee, J., dissenting), *adopted en banc,* 509 D.1s 539 (5th Cir.), *cert. denied,* 423 U.S. 891, 96 S.Ct. 188, 46 L.Ed.2d 122 (1975); *United States v. Rogers,* 504 F.2d 1079 (5th Cir. 1974), *cert. denied,* 422 U.S. 1042, 95 S. Ct. 2655, 45 L. Ed. 2d 693 (1975), we believe that *Roberts v. United States,* 455 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980), went a long way toward resolving this issue against appellees. The Court in *Roberts* concluded that the district court properly considered the defendant's refusal to cooperate as one factor in imposing consecutive sentences. Admittedly, a fifth amendment claim was not properly raised in *Roberts* and "would have merited serious consideration" if it had been. *Id.* at 559, 100 S. Ct. at 1364. We conclude, however, that for fifth amendment purposes the situation in *Roberts* is distinguishable from that here. A sentence reduction obtained by a sentenced convict due to his cooperation is not tantamount to the enhancement of a sentence imposed on an unsentences, but convicted defendant as a result of his lack of cooperation. The former is not different from a gratuitous sentence reduction offered to one already incarcerated who, even without statutory sanction, risks reincrimination in exchange for early release benefits.

Our disposition of appellees' challenges obviates the need to consider the severability of subsection (3) from the statute. We hold that section 893.135 is constitutional. The order of the trial court is reversed, and the case is remanded for further proceedings.

SUNDBERG, C.J. and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

BEFORE THE
HOUSE OF REPRESENTATIVES
COMMITTEE ON CRIMINAL JUSTICE
AT
THE CAPITOL
TALLAHASSEE, FLORIDA
APRIL 3, 1979

IN RE
PROPOSED COMMITTEE BILL 16

PROCEEDINGS

[2]

MR. CHAIRMAN: All right, a quorum being present, let's take up the proposed committee bill on drug smuggling which is entitled, what? Number 16. Question.

VOICE: Mr. Chairman, do we plan to vote this either up or down?

MR. CHAIRMAN: Yes, we do. Al right, let me just for the sake of relieving some confusion, make sure that you have in your hands Proposed Committee Bill Number 16. We have some others around that are different drafts-we have a Senate draft around and we are going to try to go with a House bill, Proposed Committee Bill Number 16. Let me just briefly explain what we're talking about here. We're approaching the drug smuggling problem from two standpoints: number one, we are going to apply a minimum mandatory sentence on people caught in the activity of trafficking in drugs; number two, we're also going to try to give law enforcement and prosecution the leverage to get at higher echelon financiers of these operations by giving them the tool of offering reduced sentences of those people after convictions, if they will cooperate and help convict people who are their accessories. Now, that is a two-pronged approach. At this point, I think we have a couple of people who would like to speak on behalf of the bill. First, let me call Representative Ralph Haben

before the Committee, who is our illustrious Rules chairman, former chairman of this committee. I think he might like to make a couple of comments.

REPRESENTATIVE HABEN: Mr. Chairman, I appreciate it. Ordinarily, I would not come down, but the reason I've done so is that I think I need to explain to the Committee something.

I am still opposed to mandatory minimum sentencing. Now, I won't go into all the reasons why I am, and so therefore I felt obligated to come down and explain to you why I'm supporting this particular measure.

Mainly, I'm supporting it because General Counsel for the Governor and the Director of the Department of Criminal Law Enforcement closed the door on the Governor's jet, and said if I didn't support it they wouldn't let on.

Seriously, though, I see, I think, a distinction between this concept and mandatory minimums across the board. The reason I'm opposed to starting with mandatory minimums, if you say mandatory minimum for robbery, what then do you say to the person who's committed murder, and then how do you say we can't have mandatory minimum for assault on an old person? In other words, if you are going to do it, you have to go across the board. Therefore, let me distinguish this, I think, example: drug smuggling, and what the Governor is trying to get at involves, obviously, a conspiracy. If you have a conspiracy, that is the most difficult of crimes to prove, I think; as Assistance State Attorney, I can tell you, it is tough to prove. I've defended conspiracy cases, and every one of those defendants, the jury was back in five minutes, turning them loose. Conspiracy is hard to prove.

So therefore, I think the Governor has come up with an (inaudible) that I can support. Two reasons: number one, you're dealing with a crime that involves a conspiracy and it is necessary to have testimony where one party to the conspiracy turns state's evidence, so

that you can ultimately convict the person that financed the operation. In addition to that, I think this is not a pure mandatory minimum. It is a mandatory minimum if you are caught and convicted or enter a plea and choose not to aid and addist law enforcement. And I think it's going to work because right now, if a pilot or a courier is arrested, what he'll do, he'll spend two to three years in Raiford, at tow or three hundred thousand dollars a year, because it's profitable for him to stay in jail. If you told him it's going to be fifteen years in Raiford without gain time, without a possibility of parole or probation, he's not going to spend fifteen years in Raiford, he's going to turn state's evidence. So, I think because of the fact that there is a way out, it is not a pure mandatory minimum on one hand and number two, because it involves a crime that of necessity must be a conspiracy, I both heartily endorse and support the concept.

Thank you, Mr. Chairman.

MR. CHAIRMAN: Thank you, Mr. Chairman.

REPRESENTATIVE MARTINEZ: Mr. Chairman.

MR. CHAIRMAN: Representative Martinez.

VOICE: Ralph, I have one question. Would the gentleman yield?

REPRESENTATIVE MARTINEZ: Sure.

VOICE: Is this built-in statutory plea-bargaining?

REPRESENTATIVE HABEN: We hope so. We hope so, because that's really what we're talking about. I think you've got to also dovetail this concept with the fact-the one thing I liked the most about the Governor's address this morning, he's willing to put his money where his mouth is. For six years I've been a voice in the wilderness, saying we've got to put more funds into the law enforcement program, and he has said all right, that's precisely what we're going to do. And I think you're going to get plea-bargaining, I hope you do, because if you get that, you'll get the testimony against somebody who finances the operation.

MR. CHAIRMAN: Further questions?

REPRESENTATIVE EASLEY: Mr. Chairman?

MR. CHAIRMAN: Mrs. Easley.

REPRESENTATIVE EASLEY: I just have one, on the section which does permit a judge to --

VOICE: Reduce or suspend it.

REPRESENTATIVE EASLEY: Yes, but it must be filed -- I can't tell, it says whenever a person is convicted or imprisoned for violation, does that go all the way through and he has to have received a sentence, or is this prior to sentencing, or both?

VOICE: That is, as I understand it, it would be after the conviction. Prior to sentencing or after sentencing.

REPRESENTATIVE EASLEY: Or after sentencing?

VOICE: Right.

REPRESENTATIVE EASLEY: If it's prior to, have we only changed the jail time -- what I'm getting at, is the guy going to have to pay that fine regardless? 'I'd kind of like to make it also not profitable. If he's in prison, I assume he's not going to have his fine returned.

VOICE: Well, the way it is there, it gives the judge the opportunity to do both. He can suspend the jail time, or suspend the fine, or suspend a portion of the fine, or a portion of the jail time. If he's in prison --

REPRESENTATIVE EASLEY: So it's up to the judge?

VOICE: It would be up to the judge and --

REPRESENTATIVE EASLEY: Now, if he's already imprisoned, could the judge also order a partial or total return of the fine?

VOICE: Yes. Yes, because that's what the bill entails, because the judge is going to suspend part of that jail time.

REPRESENTATIVE EASLEY: Would somebody tell me -- I don't have any other reaction than just, I don't know whether we want to do that or not.

MR. CHAIRMAN: Well, I think, first of all, the State Attorney has to ask for it, and the judge has to approve it, and law enforcement is going to be involved with it, too, so I think if it's done, it's going to be appropriate.

REPRESENTATIVE EASLEY: Okay.

MR. CHAIRMAN: Representative Sample.

REPRESENTATIVE SAMPLE: Did I have a question

on my face? I'm kind of concerned about why we call this mandatory. It looks like everything but.

MR. CHAIRMAN: Well, I think that it's mandatory, and it's minimum -- the concepts have different meanings in this bill. It is mandatory if they fall into this category to get it. If they do not cooperate, if the State Attorney does not petition, it is mandatory that the court impose that, so it is mandatory on the judge. He can only be relieved by petition from the State Attorney.

REPRESENTATIVE SAMPLE: All right, is this mandatory if they don't cooperate? Are we going to have to add some more specificity to what is cooperation, or are we just going to spell it out and say if you don't squeal?

MR. CHAIRMAN: Representative Fontana.

REPRESENTATIVE FONTANA: Well, I have only one question to ask staff concerning -- in discussing this with Mr. Haben. where in the statute do they define the word "substantial"?

VOICE: We can define it if you want. You can define -- you know, but it is going to be questionable --

REPRESENTATIVE HABEN: Mr. Chairman, can I respond to that?

MR. CHAIRMAN: Representative Haben.

REPRESENTATIVE HABEN: Representative Fontana, I raised that, because I started reading it first of all as a defense lawyer, and what could I do, you know, to get around that, but I'm afraid if you try to define what substantial is, you're going to open the box of information leading to a conviction, which is going to give you a problem, because what if the guy really does what he is supposed to do and turns state's evidence and, for one reason or another, you end up with a hung jury, or you lose a witness during the trial, and you end up with a mistrial or the State Attorney feels that he can't press on, and the conviction doesn't occur, than you haven't satisfied the statute. So it seems to me that, even though it would be desirable to give some degree of specificity, I think if you try to do it, I think you get into a

box you can't get back out of. It would be nice to do it. but if we do it, I think we're going to probably overload it.

MR. CHAIRMAN: Very well. Representative Smith.

REPRESENTATIVE SMITH: I'm kind of concerned about this thing, too, in that, as I understand, the money people are pretty well insulated. And the fellow we're going to catch, how much do you think he can possibly give, and -- plea-bargaining is one thing, but I just don't -- I tend to think that maybe this is more of a deterrent-type thing, personally, than it will be for anything that we can glean from this guy in terms of getting the money people.

MR. CHAIRMAN: I agree. I think it has a two-pronged effect. If you can't get it from one standpoint, it has a deterrent effect from the other standpoint. Representative Martinez.

REPRESENTATIVE MARTINEZ: Mr. Chairman, if I may, I like the concept, and I am trying to be constructive about it but you already have a tool, and that's immunity. The State Attorney can give immunity to anyone, and I think the substantial aspect of this thing is a key that might work against us. I've defended too many of these cases, and it's usually the mule, the guy that's unloading the ship, or the guy who happens to be driving the truck. The financier is the one we're trying to get. If a guy is driving a truck for someone who he doesn't know, and he's getting paid by someone else, that's as far as he can go. I think that the word "substantial" here, the way it is written, it's not a judicial question, because first of all, the State Attorney has to be convinced that it's substantial and the State Attorney has to file the petition, and the defendant doesn't have anything. He's making a deal and buying a pig in a poke, at this point. And I think if we're going to have a mechanism to determine whether the guy really helped or not, that that point there should be an adversary proceeding rather than leave it up to the State Attorney. If the State Attorney doesn't file it before this

comes into play, these are the problems I see with it. The man has to already have been convicted. That means the judge has to have him before him and say, I hereby find you guilty of this offense. He's through with the judicial process at that point. The only thing the judge can do is set sentencing further on, but he's got to find him guilty. You've already made him a felon, which is all right with me, if the guy wants to do it, but at that point, he's completely out of the picture. His attorney can't come up and say, hey, Court, now look, that's all the man knows. He's out of the picture. It's just the State Attorney and the law enforcement, and if the Law enforcement, if a detective has a particular gripe against this guy, or the guy made a fool of him before, and didn't catch him, and the policeman wants this guy to go away for fifteen years, it doesn't matter what the State Attorney is going to say, that policeman can come in and tell them, this guy shouldn't go anywhere. He should go to jail for fifteen years, and he knows who the top man is, but the defendant is there, really - there is really no inducement for him to do anything because he's not guaranteed anything. The State Attorney can give him immunity and then he's free from everything. The intent of this bill is not going to make him free of anything. Let's say he talks. If I'm a defendant, I'm representing him, and I say, look, they've given me this deal and if I talk, after I get convicted, I can get out of the fifteen years. Well, what if they're not satisfied? You've lost me at that point. Now if I get convicted, I can't go in and I can't initiate a condition, and if the judge doesn't buy it, and if the officer doesn't like you, you're going to fail with the same guys you helped convict. So I'd think about it twice. I think, really, the word "substantial", it's not even clear. The judge may have some hangups as to how far it should go. The concept is great, but unless you give that defendant something to go on so that he can at least show the court, look, all I did was drive the truck and John Brown was the one that was supposed to pay me, and John Brown

told me that his boss was going to have to bring him the money first. So who's his boss? I don't know. Oh, yes, you know, you just don't want to tell us, you haven't given us any help.

I bet that the intent might have been, and I think this might help the bill, and I throw it out just to think about - if, when we're talking on the last page, page 4, whenever a person is convicted or imprisoned, that refers to the guy doing the talking. He's got to be convicted or imprisoned. I think, really, if you want to get at the high level, then let that conviction be of the one he ratted on. If his testimony is good enough to convict him, the guy over him, then he's entitled to this, you see what I mean?

MR. CHAIRMAN: Let me see this right quick-like. We have some representatives of the Governor's office here, and I think we have Ed Blackburn, Robin Gibson and Jim White, and so, in any order that you'd like to speak, I think we ought to give all of them a chance.

MR. BLACKBURN: Well, Mr. Chairman, if I might, I'd like to respond to what Mr. Martinez had to say. Incidentally, I don't know the ground rules, Mr. Chairman. This is the first time I've ever appeared as an adversary to Mr. Martinez when he was a voting member and I wasn't. This does put me at somewhat of a handicap. We used to have some delightful - on the floor - and incidentally, he was a client of mine in the life insurance business, in which he paid his premium every month, that was drafted out of his bank account. We had some serious controversy one day on a bill and he sat right behind me; he tapped me on the shoulder and said, "If you don't stop that position, I'm going to cancel that contract. It'll cost you $3.40 a month."

REPRESENTATIVE MARTINEZ: Point of personal privilege. You know, Ed's response was, "If I weren't getting that $3.40 from you every month, I'd kill you."

MR. BLACKBURN: But, with just this little bit of overview, the Federal Drug Administration says that the narcotics business in Florida brings in some $10,000,000

a day, approaching $4 billion a year, and that we don't catch, all the agencies combined, we don't catch over 10 percent of it.

Without going into what this does to, these monies do to buy into, what this does for organized crime to increase their strength, and to buy into businesses all over the state - if I told you some of the businesses, which I can't that I know about that they have bought into, believe me, it would be frightening. They have bought into banks - I know of five banks that they own and control in Florida - they are in the real estate business, they've bought controlling in companies over the counter. Shopping centers, they're strong in, and their land acquisitions are spread from the Panhandle on down to central Florida.

So that's just a brief overview of that, but the points Mr. Martinez made about the defendants, you know, he'd lose this right, but, really, I'm not near as concerned about the defendant as I might ought to be when we see what they're doing to this state. What we're really trying to do is to get the man at the top, but if we miss one or two along the way - let me give you this example.

Just like four weeks ago, I believe it was, today, down at Newport, and it happened that I went down there one night, and the sheriffs of the three surrounding counties here, the sheriff from Gadsden, the sheriff from Wakulla, and the sheriff from Jefferson, were down there with the Department of Natural Resources, Customs, United States Coast Guard, and with the DEA. They had impounded a 65-foot shrimp boat. They thought when they first went in it had thirty tons on it; it only had twenty-four, actually. They had three trucks, two of them worth better than $50 thousand apiece, and they had, I don't know, quite a few under arrest. We later learned that this had been brought in here from Marathon. The twenty-four tons, according to the people who figure the price of this stuff over at our agency, which is something I know nothing about, said

that a minimum, when this was purchased in Colombia, this was the real good grade Colombian marijuana, said it was worth $5 million; said delivered to Marathon, it was worth ten. Whoever bought it in Marathon paid another five. But, to the point, the man who ran - and Mr. Martinez, this is the thing that was really interesting to me - the man, the captain of the boat readily admitted that his new contract was $50 thousand to deliver it from Marathon to Newport, just to deliver it here.

Well, with this bill law, in which he being required to serve fifteen years, and I believe the fine here is a quarter of million dollars, the first question that comes to mind, would he have taken this contract? I'm not worried about how he's going to get out later, you know, if so and so happens but would he have taken this contract had he known that Florida had a law that states, you're going to get fifteen years and you'll have to pay a quarter of a million dollars to get out?

More interesting than that, would the man that, (inaudible) in Marathon, who had made the deal with him, would he have hired this fellow to deliver it here had he known that if that fellow delivered it there, if he squeals on me, he can get out of it?

What we're all interested in, and I know that you folks are, is getting the people at the top of this ladder. For whatever my beliefs are worth, I think you've got to make it just as tough as you can on that man at the bottom to get the man at the top. I believe this: I believe that this Legislature will pass this bill. It'll advertise to the world that Florida ain't the place to come. And I think you'll reduce the proportion of this stuff coming in here overnight.

That winds me up.

MR. CHAIRMAN: Tony.

REPRESENTATIVE FONTANA: Let me ask you a question Sheriff. You know, I'm for the bill, but let's put it in another - let's reverse it all a little bit. Let's say that you, Sheriff Blackburn, is the person with the money. Now, Haben has a license that, he flies, so it so happens

that Mr. Haben feels one time that he needs some cash. So he's going to take that one shot, and he's going to fly that carg somewhere, okay? Wasn't sure he's going to get his money, he didn't get caught. The other fellow with the money, what about later on when you get picked up, and you say, well, okay, now, I'm going to come under this statute because I'm going to tell you who flew so many tons of marijuana, whatever, into this airport or whatever. You have the same right, then, to go to the State's Attorney and start saying, well, now look, I know that Ralph Haben flies, I know that, and I can prove to you that on December 2nd he flew ten tons of marijuana to anywhere. That gives you the same right - you're the fellow that's putting up the money, now - to go ahead and rat out on Mr. Haben and send him away.

MR. BLACKBURN: When he wasn't a part of the same deal, is that your point?

REPRESENTATIVE FONTANA: Right. He's moving marijuana, he moved it once, that's all.

MR. BLACKBURN: Well, I think the State's Attorney, under present law, has the authority to do that, without this statute. I believe that he has. I believe that the State's Attorney, right now - let's say, let's forget this bill. That anybody that's charged with a crime, if you were to go to the State's Attorney today and say, you know, if you'll go easy on me on this one - you've done it, you've done it, too, in - Sheriff (inaudible), you've done it in burglary cases. If they'll give you evidence on somebody else, on a bigger one, I bet you that you'd stop back and think - we've all done it in law enforcement.

REPRESENTATIVE FONTANA: But you haven't answered the question. How do you get the man with the money if he goes up and he tells them, tells the State's Attorney about how it's being transported and who's involved? Do you understand what I'm saying?

MR. BLACKBURN: Maybe all you catch is the man at the bottom. Maybe all you catch is the man - I'm not concerned with the defendant that will bring these drugs

in here. This bill doesn't only talk about marijuana. It talks about heroin, cocaine, morphine, the rest of them. I'm really not as concerned about their rights as perhaps I should be. I'm thinking about what they're doing to this state. Last year - what they're doing to our children. Last year in Florida along, under the age of twenty-five, over twenty-five thousand young people were charged with narcotics violations. I want to stop these people that are bringing in here, stuff. And if some of them lose, are imprisoned along the way, that's just too bad.

MR. CHAIRMAN: Let me, before we have any further questions, let me ask Robin Gibson, if he would, to make a few remarks, and then, at that point, we'll ask some more questions and discuss it. Robin Gibson is with the Governor's office.

MR. GIBSON?: I want to make a couple of remarks. I also want to make an introduction of Jim White.

First off, the bill is designed not to get the mule, but to get the thoroughbred. It can be interpreted to where you can go up or down the ladder, but the information has to be substantial enought to warrant the State Attorney's filing his petition, and thereafter, consideration by the judge.

I'd recommend that the language of the statute stay as it is. If we had a particular case before us, if we knew what the facts in that case were, we could collectively decide what the best thing to do was. But we don't have the facts of a particular case before us. We have to give the authority to the State Attorney, who has the facts of that particular case before him, and trust in the good judgment of the judge who has the facts of that case before him. We would be doing ourselves a disservice, I think, if we gave our Law enforcement people the tools, and then by adding restrictions or making requirements on how these tools would be used, we'd, in effect, be tying one hand behind their backs, and the tools would be laying out in front of them.

We should give them the maximum discretion to determine what substantial assistance is. Like Sheriff

Blackburn says, if they determine that that piece of information is not adequate, I'm not sorry for them, either. It's just not substantial enough to warrant getting out of a prison sentence of this kind for an offense of this kind.

But unless we knew what the particular facts of the case were, we'd better leave that up to the decision of the people who have the facts of that case in front of them.

The unique quality of the crime with which we are faced is that number one, it's an economic crime, and number tow, it involves a network. This statute is aimed at economic aspects of that crime, by, one, imposing stiff fines, and by, two, going after the people who have the money, and that are at the top of the structure. And since it is a kind of a network, it requires, as Mr. Haben is talking about, it requires a method by which you can go step by step up the ladder of this conspiracy. Like Sheriff Blackburn says, it has two effects. We're just here talking about the practical effects, now, a real case. But, as the Sheriff talks about the symbolic effects we need the statute in its present form so that it will have both the practical strenght and the symbolic strength that the statute has to offer.

Jim White is the Assistant General Counsel in our office, who is in charge of law enforcement matters. Jim has tried a number of these cases himself. He and Sonny Palomino have worked together on the drafting of this statute, and I'd like to introduce him for his comments. He can explain the provisions of the statute, and field some questions on it. I, in closing, I would just simply say that, on behalf of the Governor, that he has recognized what we all know: that is, that this is a unique problem that is at our doorstep.

We have a national problem on our hands. We just happen to be the gateway for it, and a unique problem requires a unique solution. This statute is a unique statute, and it is something that would be new and different and of material assistance to law enforcement

agencies in our state, and we need it. Jim.

MR. CHAIRMAN: Before we hear, any questions about this? Representative Lehman.

REPRESENTATIVE LEHMAN: I wanted to ask one question. Can anybody give me any indication on how much violence has been involved in these large hauls of drugs?

MR. WHITE: Mr. Chairman, members of the Committee, I appreciate the comments. We worked with regard to building this bill around the format that Mr. Gibson and Representative Haben and our executive director, Sheriff Blackburn, have indicated.

The problem is, however, in dealing with these people, that they have us covered (inaudible). Having handled cases like this, you're exactly right; the people that you catch at the dock, the people that you catch at the airport, the landing facility, are all mules. They're people that are working for somebody else. Most of the time, they know who they're working for, because people don't put $5 million worth of drugs in their hands, and not have some tie to them and know where they're going and know who they are.

They will represent to you many times that they don't know who they are working for. But I think logic will explain that they have got to have some contact between them and the man with the money, the man that's controlling the operation. These people are the beginning point.

At the stage of the proceedings we have now, with plea-barbaining in - with the tools that we have for plea-bargaining right now, most of these people are assured that if they max out, if they get five years in the state penitentiary, they will do 18 months, if they do it under good time. If they do 18 months, the people in charge explain to them that you will be paid a minimum of $50 thousand dollars a year, your family will be taken care of, and when you get back out, you will have a job. All you have to do is keep you mouth shut.

On the other hand, if you talk, you'll be visited by

sounds in the night. And, consequently, we get no cooperation. I've have off-loaders tell me, I'd like to help, but I need the rest. I'm going to take the 18 months and the $100 thousand dollars, and I'm not going to help you.

On some occasions, when we've been able to keep plea-bargaining to a minimum, in a good solid, cold case, some of these people have offered some assistance to us. The experience in this assistance has been that they feel like they will tell you just enough to get out from under the heat. They don't want to tell you everything, so they'll give you just enough. The position that we have taken, and the way that we try to make whatever assurances we can, is we have their defense attorney come to us. And their defense attorney can tell you a, b, c, d, and e; we can tell you where from, we can tell you who paid us, we can tell you all these sorts of things, and we will be prepared to testify to that. If we were able to do that, and if we were able to come across, and if we were able to assist you in that fashion, could you consider that substantial assistance?

At that stage of the proceedings, we could say yes or no. Now, sometimes, substantial assistance could be a conviction. But sometimes, it may be worthwhile to the State Attorney and to the investigating agency just to have the intelligence. They may not be able to see a conviction right away. They may not even be able to use this man on the stand, because of his past criminal history. But maybe he can provide them enough probable cuase for a search warrant, or enough probable cause for a wire intercept, or something of that nature. So, when Robin Gibson tells you that if we begin to tie down this thing and say, well, you have got to have a conviction, maybe the law enforcement officers at this stage of the proceedings wouldn't want to use this man for a conviction. Maybe they'd want to use him as a confidential source. Maybe they'd want to use him to be present at the next time one of these smuggling operations was planned.

So, I think the other matter that I wanted to discuss briefly is, I would hesitate in turning this substantial assistance into an adversary proceeding. I would hate to be a State Attorney who, I'm planning using this particular individual to assist me, but at the same time, I know, down the road, he and I are going to be arguing, involved in an adversary proceeding as to how much his assistance was. That makes him want to pull back just a little bit.

Maybe my defense attorney can argue that if I just tell them the names, that would be sufficient. Maybe the State Attorney wants me to tell them the names, the dates, and the suppliers. Well, I'll just tell them the names, and we'll get my attorney at argue before the court that that was substantial assistance.

So we would raise, simply, as I would see it, we would raise a real controversy, that the whole time you're trying to get this person to assist you.

VOICE: Another trial.

MR. WHITE: Yes, really, you'd have a mini-trial. You'd have another trial to try whether or not that was substantial.

If that State Attorney, along with the investigating or arresting agency, can commit to you and tell you, sure, if you tell me a, b, c, d and e, or if you can do this or that, in light of the information we already have, that will be substantial. That's the way it's handled now, with immunity.

But, you see, with immunity, you have to give them all one shot or not. There's no middle of the road. This provides the State Attorney and arresting agency with a middle ground or middle of the road approach they can take.

We hope that we will - I know Representative Haben is a pilot, so - but I want to use him one more time, he was already used previously. But, we want to keep the one-time pilots out of the business, too. They're breaking our backs with what they're bringing in. We want to serve as a deterrent all the way to the bottom,

from the bottom all the way to the top. If this bill goes at the people who are involved in trafficking, we're not talking about people who are involved in first-time use, or the people who are involved in possessing a little bit for their own use and their friends. The values compiled here were compiled with the consultation of Law enforcement agencies, State Attorneys, and other knowledgeable people, informants, for that matter, and they tell us that these amounts are the amounts of heavy traffickers.

Somebody caught with this should be - have to pay the piper, or at least have to give substantial assistance.

MR. CHAIRMAN: Any questions of Mr. White?

REPRESENTATIVE MARTINEZ: I have a question.

MR. CHAIRMAN: Representative Martinez.

REPRESENTATIVE MARTINEZ: I think perhaps my remarks were misunderstood. Are you telling us that the informant will cooperate simply on a promise, you tell us everything we want to know, and then we'll see about getting you under this program? That's what the bill says now. We will decide, we will decide after you tell us everything you want - we want to know, we will decide then whether you come under this program or not.

What I'm trying to say is, I have no argument with that. But what inducement would it be to him, to this man, if he had no assurances whatsoever that he could strike a bargain prior to his being convicted? If he doesn't strike a bargain before he's convicted, he's going to be dead. And we all know that.

MR. WHITE: If I may respond, sir, I think it meets the same rationale as we do with immunity. It only gives us a middle ground.

In the cases that I've been involved in that have dealt with granting immunity, I never grant immunity before I know the nature, not the individual facts, but the nature of the information the defendant seeks to give me. And I think you can get this if you represented a client who could give us the names, addresses, dates, telephone numbers, and places of meeting before you

told me those specifics, the representative, the defense attorney would come to me and say, listen, I can tell you the date, the time, the names of the people, where they're going to deliver and what time. Would you consider that, if I come through on those things, would you consider that substantial assistance? The State attorney will then inform you at that stage of the proceedings yes or no. You don't have to put your pig in a poke. Just like in immunity, you know, the State Attorney doesn't put his pig in a poke. He asks you the nature of the information before he grants immunty, and if you don't provide it, you don't get immunity. And if you don't provide what you say you're going to provide for substantial assistance, then you won't get the recommendation of the State Attorney. But you will know prior to ever having your client come in and sit down and tell the State Attorney what he knows, by telling the attorney, the State Attorney the nature of the information, whether or not he would consider that substantial.

REPRESENTATIVE HABEN: Mr. Chairman, if I might, to sort of resolve some issues, there have been two or three items raised that I think, perhaps, there is an answer to, and I think Mr. White has touched on a couple of them.

Representative Fontana raised a very valid, if not objection, at least a point, and that is, what do you do if you reverse the process, if you catch the principal and the principal now says, okay, here's what I'm going to do. I am going to testify, and even though you are after me, and that's the purpose of the statute, I am going to escape liability.

I think you have got to look at one thing. If you think that you have a top man caught and convicted, you don't have to go to him and ask for any statement. You just don't interrogate, and if you don't interrogate him, he can't comply with the statute. If he doesn't comply with the statute, he can't avail himself.

Number two, as far as catching someone on the lower

end of the spectrum, and if you truly believe that he does not know anything; and remember this, you know, the prosecutors still have their own devices. And it's just like everybody wonders, well why does the mandatory minimum work? Well, it works, but there are a lot of cases filed under a different section of the statute and they don't file under the mandatory minimum, do they, in the 12th Judicial Circuit? So you see, that's another way around it. But I think the largest objection goes with what Representative Martinez just raised, but let me suggest something to you, and I think Mr. White touched on it. The first time somebody turned state's evidence and the State Attorney sticks it in his ear, that word will go out, whether it be in Hillsborough County, or any other circuit in this state, and if that happens, I think no one will ever want to turn state's evidence again, and I think that word will get out quickly enough, so that, you know, if you can't trust your State Attorney, who can you trust? But if he ever does take advantage of the information and then refuses to do this petition situation, I don't think he'll ever get to use it again, and I think by the time the press gets through with that number, I think the State Attorney is probably going to have some serious problems. And what you raise may well be valid, but I think what Mr. White says, probably, may be the better reasoned argument, because he's saying don't let us turn this into a mini-trial, because when I represent a criminal defendant, which I used to do, you went to the State Attorney and said, look, if I do, and incidentally, all these people are going to have attorneys, because with this amount of money, the syndicate or the organization is going to provide them with money, so if that be the case, they are going to be represented by very good legal counsel. So, therefore, the deal will be struck, as Mr. White suggests, between the State Attorney and the defense counsel. So, he has no objection, that's the way plea bargaining takes place right now. You don't know what you're going to get, the judge allows the State Attorney and the defense to work

something out, come back, indicate what it is, there's a conviction and then there is a sentence based on what that arrangement is, so I don't-I don't think that's really going to be a problem.

MR. CHAIRMAN: Representative Smith.

REPRESENTATIVE SMITH: I would take a different tact, and I might, that there is-does live within our society a rather liberal element. I'm concerned about the other standpoint, and it stems on the word substantial. How about the guy giving just so much data, and he gets off? And without, you know, giving us something of substance? And what is "substantial?"

MR. WHITE: If I may respond to that, first of all, the State Attorney, who is, of course, the elected representative of the law enforcement community, has to make a decision first that what he is given is substantial. Then the bill provides that the arresting agency can come in to be heard aggravation or mitigation, and they can tell the court, "No, this isn't substantial, we don't think it is," and explain their reasons. Or the state-or they can come and tell the court, "Yes, we do think the reasons are substantial."

At that stage of the proceedings you have two people, the State Attorney and the input from the law enforcement agency, to indicate to the court whether or not they think that was substantial. If you had it so that the defense attorney could file the motion, then he could initiate the proceedings that would be before the court without the State Attorney ever passing on the substantial nature of the information, or the arresting agency ever passing on. Many times, that feeling is based on tons of intelligence information about whether or not-for criminal syndicates, all we need to topple them is that much information. In other syndicates, we may need a mountain of information to be able to topple them. So you've got to leave that decision making process with the State Attorney and with the arresting agency.

REPRESENTATIVE SMITH: Yes, so then if I

amounts to try to bring them in in various-

(Some testimony lost due to poor taping.)

MR. CHAIRMAN: Representative Sample.

REPRESENTATIVE SAMPLE: Sheriff Beard, may I ask you, in that case that you stipulated there, do you think had you had this bill at the time, that you could have gotten those sailors to squeal?

REPRESENTATIVE BEARD: I think it would have been a weapon that we could have used to make them talk. They have a choice in this bill, isn't that it? They either do this time, fifteen years, or they get a chance to-

REPRESENTATIVE SAMPLE: Do you think they knew something that they could tell you?

REPRESENTATIVE BEARD: I think they did.

REPRESENTATIVE SAMPLE: And this would have produced it?

REPRESENTATIVE BEARD: Right. I don't think people that kind of property into their hands without them having direct contact with them.

REPRESENTATIVE SAMPLE: And you think this bill would have produced the information you want?

MR. CHAIRMAN: Robin Gibson.

MR. GIBSON: On a whole other item, which I think the lawyers and prosecutors among us could understand it, but as I hear the discussion I think this might be helpful.

In the system, as we go along here, there are three stages. In the third stage, we have a void and we need help, because minimum mandatory, as Mr. Haben is talking about, is counter-productive. Let's just go quickly through the three points.

At one point, the State Attorney has, before the action is filed, the option as to whether he grants immunity. He's in a good bargaining position. The court is not a factor and he can say, if you will help me convict somebody more important, I will grant you immunity. He has that power at that point, right then. Then he can grant the immunity. We're in good shape on that level.

The next level, the action is filed, and it is before

sentencing. At that point, there, the State Attorney can say, well, this action has been filed against you, it's now up to the court to sentence you. The best I can do for you now is, if you want to give me information to help me with somebody else, is point this up as a mitigating circumstance to the judge, and recommend a reduced sentence for you. And that's done upon many occasions, and is extremely helpful, and we have the machinery for that.

Now, the conviction has occurred, and the sentence has been pronounced. And the man goes off to jail. This is what the big man really wants, because he's been taken out of the system, and he can't hurt him anymore. We have a void, now. There's no way to reach him. All we're dealing with these people now is with the Parole and Probation Commission; are they good people in jail? And lots of times, of course, they're wonderful people in jail. All kinds have been sentence to get out.

So, they're model prisoners, and we have just, with a minimum mandatory that Mr. Haben is talking about, we have just done exactly what the higher-ups would like to do; we have put these people off in jail, away from where they can hurt the people that are higher up.

Now, this bill comes in, and fills this void. It says that, and gives us a new tool, and it says if you're in jail, and when the steel bars close is when these people really start thinking, you're in jail now, there is a tool that didn't exist before. When the reality of this thing sets in on you for the three years to five years to ten years, and you want to cooperate, we now have a vehicle by which you can cooperate.

Many of these people are not believers until the sentence is actually pronounced, and then we would have the opportunity to take full advantage of the information these people could give us, and our system's one, two, three steps, all the way along the line, would have the strength that weneed for it.

REPRESENTATIVE FONTANA: Mr. Chairman.

MR. CHAIRMAN: Representative Fontana.

REPRESENTATIVE FONTANA: I would just like to basically go along with the sheriff, Beard, as far as the bill goes itself. I think the key to the whole bill, as you just heard explained, is the conviction is already there. There's no deals made prior to the time that the person is convicted. And I think that the key to the whole bill, and to what they're trying to arrive at, is, once that man is convicted, so I agree with Sheriff Blackburn, so bring in all the little mules. Finally, we're going to run out of mules. And, these people have got a jail term facing them, and I don't care, you know, how much money organized crime has, they can't afford to put everybody on the payroll. And I think that we ought to, at least, give the opportunity. So let's try this for a year or two. I'm sure it will show some success, one way or another. If not, we can always repeal it.

MR. CHAIRMAN: Let me - we have one technical amendment we need to put in that the Xeroxing took some words off, on page 4, line 12, "reduce or suspend sentences", inadvertently left off by the Xerox machine. Without objection, any questions? Page 4, line 12.

VOICE: After the word "may"?

MR. CHAIRMAN: After the word "may".

REPRESENTATIVE EASLEY: Yes, what does go in there?

MR. CHAIRMAN: "Reduce or suspend the sentence."

Without objection- any objection? Show the amendment passing without objection. Representative Smith.

REPRESENTATIVE SMITH: I'd like to bring this to the bottom line. I really would.

I'm a criminal defense attorney, and I've practiced a number of years doing that kind of work in addition to some others. I've also been involved in the PTA's, being a past president, involved in the juvenile justice system a couple of years, and I'll tell you the truth, it hurts me desperately every time I hear that people say we haven't got the funds, we haven't got the manpower, we haven't

got the money to stem this ever-increasing tide. And I turn around and I see children by the hundreds hooked on drugs from cannabis all the way up.

I am not yet convinced in my own mind that cannabis either does or does not start them on the road to the more habitual and addictive drugs, but, in any event, I believe it's a link in the chain to some degree. We have a problem in my county and many other counties in this state, where children who run away, for a number of reasons, from home, wind up in the drug train because their minimal contact with social and economic circumstances prevents them from making the kind of decision that they ought to make. The either get recruited to be in it, or because of peer pressure, start in it.

We must take some stand. If we haven't got the dollars to be able to totally, as an army of law enforcement, get into the fight and beat them at their own game, we ought to take some other steps which don't cost us the money. This is a totally no-fiscal-impact type of bill, it seems to me, and I, frankly, have two children who are growing up. I'd hate like hell to have to some day look at my kid and stand him before a judge in my county, because he started smoking, and have to look at him and think that I had something that I could have done, and didn't do it, for whatever reasons I would have had.

It doesn't cost us anything. It's about time we standing toe to toe with these people and slugging it out. We have been made the laughingstock of the United States. We are the importers, in an indirect sense, because we don't have the ability to police our own borders, on the sea, especially, and whatever tools are available to us should be maintained.

Now, as an attorney, this bill wouldn't bother me at all, because, quite honestly, you make the punishment greater you make the fines greater, you're going to increase the lawyers' fees. There's nobody here that should be concerned about that, and I'm certainly not.

Now, that's not meant at anybody - I mean, as an attorney, I don't - you know, we convict them - if they're defended on one charge, they're defended on another charge, this is just another way of being able to get to them, and I would urge everybody around this table to say, damn it, it's about time that we really did what we have to do to get ourselves out of this terrible situation we're in.

We cannot keep everybody looking at us, waiting for us to do something, while these people run rampant over us, and I'm just ready to vote on it right now.

VOICE: Mr. Chairman, move the bill.

MR. CHAIRMAN: We have a motion for the previous question. Let's take it, that order.

REPRESENTATIVE MARTINEZ: I have an amendment.

MR. CHAIRMAN: We can take up the amendment now, Representative Martinez, but the staff advises me, and I concur that it's not technically in order. I know what you're trying to do; I don't think it'll - it doesn't fit on line 4 - page 4, line 6, where you want it to fit.

REPRESENTATIVE MARTINEZ: Well, which bill are we talking about, Mr. Chairman?

MR. CHAIRMAN: We're talking about number 16.

REPRESENTATIVE MARTINEZ: Is that the one with the staff summary attached to it?

MR. CHAIRMAN: It's number 16. On the front page, it has to say "Proposed Committee Bill Number 16."

REPRESENTATIVE MARTINEZ: Is this it?

VOICE: Thats's it.

REPRESENTATIVE MARTINEZ: Look on line 7, page 4.

VOICE: Your amendment, I believe, proposes that before the words "state attorney" you insert "the defendant or the state attorney", right?

REPRESENTATIVE MARTINEZ: Right.

VOICE: Well, if you keep on reading, it says, "the defendant may take into cooperation any account." He can't take into account any of his cooperation, it's got to

be the State Attorney. And by putting "the defendant or the state attorney may take into account the cooperation", it doesn't fit in there.

REPRESENTATIVE MARTINEZ: Mr. Chairman, I don't want to belabor it. I just want to say one thing, if I may, if the Chairman will allow me.

Gentlemen, I think maybe my intent has been misinterpreted. I'm going to vote for the bill, there's no question about voting for the bill. But, knowing the law as I know it, I think, and the purpose of committee meetings is so that we can all discuss these things. If the committee doesn't want to go into it, it's fine with me. I'm going to vote for the bill, regardless of however it goes. But these same people that we're talking about, all this money, the first that anyone has this applied to him doesn't get what he wants, you're going to have a challenge of this bill, and money's not going to be an object, and the tool which you seek so vehemently, and I agree with you, I think it's an excellent concept, but I just personally feel that there's no one that can count on this bill doing what it thinks it's going to do without giving some assurance to the defendant that if he's going to cop out, he's going to have an opportunity to show that he did the best he could, because his life is going to be on the line. I'd rather spend 15 years in jail than be found in some Dade County-in the trunk of some airport, four or five days after my wife has missed me. And I think, when the judge sentences anyone, regardless of whether it's a plea-bargainer or not, he tells that man, you have 30 days in which to appeal this sentence, and if you think that if the guy who cooperates desn't get what he thought he was going to get, and they slap him because the policeman said, he didn't tell us everything we wanted to know, we think he knows more, and he has no opportunity to show that he's done everything he can, you're going to have a flaw in this bill, and what we've attempted to do with this bill is going to backfire, and we're going to be right where we are now, and I suggest to the fine gentlemen to look at

that aspect and, you know, I don't want to belabor it anymore, I just thought that that's what committees were for. But we'll vote on the bill, and I want to vote for the bill, but I want to caution everyone that we're - we might be acting too hastily with going full steam ahead in our endeavor to do what's right, and leave this thing so that you've got the tool, and it's like one of these little tools I was using a clamp to fix a drawer at the house, and I turned the clamp just one more turn and it snapped, because I tightened it too much. I'm afraid that this clamp we think we're imposing will backfire, and we're going to be right back where we are, and we've lost a tool.

I don't see anything wrong with giving it some consideration, and we do have a thing known as due process. I just think that this falls a little bit short of that, and we're going to have a lot of repercussions and we're not going to really do what we think we're doing.

I like the concept, it's a good bill, and in order to satisfy my good friend Sheriff Blackburn, I'd like to have the privilege of moving the bill.

MR. CHAIRMAN: We have a motion then from Representative Martinez to move the bill. Question is now on the bill, Proposed Committee Bill number 16. The secretary will call the roll.

COMMITTEE SECRETARY: Representative Beard.
REPRESENTATIVE BEARD: Yes.
COMMITTEE SECRETARY: Representative Easley.
REPRESENTATIVE EASLEY: Yes.
COMMITTEE SECRETARY: Representative Fontana.
REPRESENTATIVE FONTANA: Yes.
COMMITTEE SECRETARY: Representative Kershaw.
REPRESENTATIVE KERSHAW: Yes.
COMMITTEE SECRETARY: Representative Martinez.
REPRESENTATIVE MARTINEZ: Yes.
COMMITTEE SECRETARY: Representative Reynolds.
REPRESENTATIVE REYNOLDS: Yes.
COMMITTEE SECRETARY: Representative Sample.

REPRESENTATIVE SAMPLE: Yes.
COMMITTEE SECRETARY: Representative Jim Smith.
REPRESENTATIVE SMITH: Yes.
COMMITTEE SECRETARY: Representative Larry Smith.
REPRESENTATIVE SMITH: Yes.
COMMITTEE SECRETARY: Representative Tygart.
REPRESENTATIVE TYGART: (no response.)
COMMITTEE SECRETARY: Representative Williams.
REPRESENTATIVE WILLIAMS: Yes.
COMMITTEE SECRETARY: Chairman Crawford.
MR. CHAIRMAN: Yes.
Okay, by your vote, the bill passes.
(Whereupon, the Committee was adjourned.)

CERTIFICATE

STATE OF FLORIDA
COUNTY OF LEON

I, JERRY L. ROTRUCK, Court Reporter at Tallahassee, Florida, do hereby certify as follows:

THAT I reduced the tape recorded record of the foregoing proceedings to typewriting, or under my supervision, and that the foregoing pages 2 through 43, both inclusive, contain a full, true, and correct transcript of the proceedings on said occasion;

THAT I am neither of kin nor of counsel to any parties involved in this matter nor in any manner interested in the result thereof;

This 14th day of September, 1979.

[S] Jerry L. Rotruck, CM
JERRY L. ROTRUCK, CM.

Court Reporter and Notary Public, State of Flordia at Large.

My commission expires 11/20/81

SENATE PRESIDENT: Senator Myers, 37.

SENATOR MYERS: Yes, Mr. President, I respectfully withdraw my motion. I have determined that it would take a two-thirds vote, and it-and out of respect for the Senate, I don't want to hold up debate on this measure.

We ought to debate it and dispose of the matter one way or the other.

SENATE PRESIDENT: Senator Spicola, are there any other amendments on the desk?

SENATOR SPICOLA: Well, we have to adopt that one, I believe, Mr. President.

SENATE PRESIDENT: Have we already adopted the principal amendment?

SENATOR SPICOLA: Right, and -

SENATOR SPICOLA: All right, there is a title amendment on the desk.

SENATE PRESIDENT: That has been adopted.

SENATE PRESIDENT: Senator Gordon, do you want to take up - he has got an amendment to the original amendment, but it is going to have-you have to move to reconsider the vote by which it went to - by which amendment was adopted.

SENATOR GORDON: No, no. It is an amendment to the - to his amendment. We are not on third reading, but it has already been adopted, you see.

Now I can amend it. It is what is in front of us, is that right?

SENATE PRESIDENT: Oh, it is an amendment to what is non-existent.

SENATOR GORDON: I just wanted to identify where it was.

SENATE PRESIDENT: Okay. You have got the amendment. Read it.

VOICE: By Senator Gordon, on page five, line ten, insert "there is hereby appropriated the sum of $2,250,000 to increase the number of positions in the Department of Criminal Law Enforcement by 150 to

carry out the intention of the Act."

SENATOR GORDON: I have not been able-just to explain that amendment, I have not been able to get the precise figures, because the analyst on that doesn't happen to be in the office at the moment, but that is the approximate amount that the Governor asked for in his budget to go along with his program of drug law enforcement.

And I think just so we understand the implication and some direction to the sub-committee, I think it is an appropriate place to put this amendment.

SENATE PRESIDENT: Senator from the 22nd, for what purpose do you rise?

SENATOR SPICOLA: To speak in opposition to the amendment.

SENATE PRESIDENT: For what purpose does the Senator from the 1st rise? Senator from the 22nd is recognized, then the Senator from the 1st.

SENATOR SPICOLA: Senators, I hope you realize what this is.

This is a method to do indirectly what they couldn't do by the point of order that was raised earlier.

I think appropriately that that budget item ought to be considered in the budget. That is the way we have done it in the past. There is, the Governor's proposal is much broader than just drug trafficking. It deals with the whole gamut of state attorneys, FDLE, the whole law enforcement area.

And it is just a method to tie an amendment onto the bill that will, if you do adopt it, it will be then subject to a point of order and have to be referred, and it will railroad this bill, and I hope that you will see it what it is and I hope that you will vote it down.

SENATE PRESIDENT: Senator from the first.

SENATOR CHILDERS: Yes, Yes. Mr. President, and Senators, the sub-committee on general government, sub-committee A, in Ways and Means, has addressed this issue, I guess, maybe for the last month, and we are committed, every member of the committee,

sub-committee, which is the committee chaired by Senator Gordon, we are committed to fund the Department of Criminal Law Enforcement, the Department of Law Enforcement, a crack team that the Governor wants, whatever is necessary in order to stop the smuggling in Florida.

We don't want the reputation, but if this amendment is adopted, then it would go back to Ways and Means.

Now, the sub-committee is totally committed to fund at whatever level is necessary, whether it is a million, or five million dollars.

The enforcement of the bill and we are going to do it. We have already tentatively put it into the budget. We have got the Department of Natural Resources with investigators for drug smuggling.

They have got in every, in every area they have got drug enforcement officers. The Game and Fish Commission is working on it. They work in conjunction with the Department of Agriculture, and then the primary agency is the Department of Criminal Law Enforcement.

That is where our effort is being made to beef up that agency, that department, to give them the necessary tools that they need, the manpower to stop the drug smuggling in Florida, so we are going to do it.

It will be in the budget. No one knows exactly what it is going to require, but we are fully committed. I think every member of the sub-committee is fully committed to see that the Department of Law Enforcement is adequately funded, and that is a proper place.

SENATE PRESIDENT: Senator from the 10th, are you speaking - you were on your feet a minute ago. Do you want to speak?

SENATOR DUNN: No, sir.

SENATOR PRESIDENT: Okay, Senator from the 28th.

SENATOR CHILDERS: Mr. President, I would also like to reiterate the fact that I think everyone knows that Senator Gordon is opposed to this bill and the fact that I think he has made several efforts to legalize marijuana

and I think this is just another ploy to delay it and I would hope that we are to defeat the amendment.

SENATE PRESIDENT: The Senator is recognized to close.

SENATOR GORDON: No, I don't want to withdraw it. I think it is important for everybody to know the cost of this most useless of the crusades that the Governor is asking us all to embark on with him. All we are going to do is spend this much more money as you heard the sub-committee chariman say for the Department of Criminal Law Enforcement. But everybody else wants to get into the act so, we are going to give more money to the Department of Natural Resources, because they have those boats out there and airplanes and now the Game and Fish Commission want to catch the river smugglers, I guess, because they're on fresh water versus the saltwater smugglers that the Natural Resources is going to get, and work every other agency that can find its way into this act is going to join in this bonanza to pursue a totally illogical course. What impressed me about the Governor's proposal was, that he said that this is an economic crime and I know the Governor well enough and I know his knowledge of economics well enough to know that he didn't really analyze the economics of this situation. All you're going to do when you increase number of illegible people involved in law enforcement is that instead of confiscating, as is now estimated, five percent of the marijuana coming into this State maybe you will raise that to seven and one-half or ten percent. Of if it's now at ten percent you will go to twenty. So what will I do?

Let's just do a little basic course in supply and demand. The demand is out there, obviously. There are thirty or forty million Americans who are regular users of marijuana according to a variety of people who ought to know. The sponsor of the original bill, Senator Childers, pointed out that it's a five billion dollar business in the State of Florida.

So, obviously that five billion dollars in coming from people who want to buy it. The demand is out there. So

when you restrict the supply by throwing two million, five million, eight million, ten million dollars at the problem, all you're going to do is those smugglers that are successful are going to charge a higher price and make more money.

So all we are doing by this business of over-regulating this illegal business is driving up the price. Much the same thing that Senator Dunn has been pointing out with the over-regulation in certain of the areas of professional occupational regulation.

You restrict the number of people who can practice, it drives the fees up, exactly the same thing here. I'm just telling you I know that for many of you, the emotional issues surrounding the question of the use of drugs and the assumption that that's where popular opinion is, leads you down a dead end path like the Governor is asking us to go. Because we think that's what is popular.

I have been talking about legalization for a long time and I've yet to receive very many critical letters from my consitutents, or from anybody in the community. And, I am perfectly able to survive in a very heterogeneous community, survive politically with this kind of view. I take it simply to point out to you that I am utterly convinced that the public is far ahead of the legislature, and far ahead of the Governor in understanding marijuana use.

I am not talking about cocaine or heroin, I'm talking about marijuana. That marijuana use is as pervasive as the illegal use of whiskey, beer and wine was in 1925, or 1927 or 1929.

It is not going to be able to be controlled, and you just wasting tax payers money and creating tremendous profit for crominals and organized crime by making it more difficult so the pay-off has to be bigger and the business gets more monopolistic.

Organized crime arose in this county out of the ill profits on liquor, because they are the ones that organized the business, and they brought it together and they were able to do it in spite of any law enforcement

attempts because people wanted to take a drink.

In this day and age people not only want to take a drink but a lot of them want to smoke. To try to stop them by spending eight million dollars or eighty million dollars or fining them, whatever these fines are, which incidentally don't go back to the state, but go to the local government, so there is no offset, is just sheer foolishness.

I just want you all to know speaking as, as somebody who knows something about economics and someone who is fiscally conservative, you are throwing money down the drain. You are making a fortune for people who are breaking the law.

Neither one of which are things that you would ordinarily do if it was another subject that didn't have this emotional overtone.

You would never, never throw away money like this and you would never, never turn around and consciously raise the profits of people in the illegal business.

You would never consciously assist organized crime. So, I'm asking you to do in thinking about this bill and other bills about it, is try to strip away your emotional concern and just think about it as a very simple problem. That this is what human behavior is, we may not approve of it, we may not like it, but a lot of things happen in this world that we don't approve of and we don't like that other people do approve of and do like. We can't change everybody's behavior to match our own. That's number one.

Number two, we don't want to create a situation in which the people who are doing the illegal things are making money and even making more money because of the kind of money we are spending in law enforcement to raise their prices.

That is essentially what this whole silly, emotional notion of throwing some money into law enforcement to cut down trafficking in marijuana is going to do. I think it is silly and stupid and the Governor and the people who support him in this generation is going to look awful silly in the history books. Just like, if you go back and

read the actions of the prohibition people in 1920, 1925, it is absolutely hilarious when you read it. All of us are also going to look that way in the history books, ten, twenty, thirty years from now.

So, I am asking you to be rational, put on your economic hat. Look to save the money. Use some creative restraint. Be creative in terms of changing your notion about what's to be done with marijuana. Be creative enough to see that it ought to be legalized and taxed so that we get the money. Show some restraint in expanding the bureaucracy in Law Enforcement, Department of Natural Resources, Fish and Game Commission, State's Attorney, Public Defenders, Departments of Correction, County Jails, Sheriffs, City Police Departments, all of those things, all you are doing is adding up the price.

Thank you Mr. President.

SENATE PRESIDENT: Senator from the 7th had a question?

SENATOR SCARBOROUGH: Mr. President, I wanted to make some remarks, I didn't realize that the Senator -

SENATE PRESIDENT: The Senator was closing.

Senator Gordon was closing.

SENATE PRESIDENT: You want to-I don't want to get Senator-

SENATOR GORDON: I'll waive any further-

SENATOR SCARBOROUGH: Thank you, Senator Gordon. Thank you Mr. President.

SENATE PRESIDENT: If you think Senator Gordon - wait until Senator Gordon gets his marijuana bill up here if you think that was a speech, that was nothing. He gets really wound up in a few minutes. Go ahead Senator.

SENATOR SCARBOROUGH: Mr. President, Senators, I want to fully understand that from a personal opinion, I think that the jury is still out on the dangers of the use of marijuana. I don't advocate legalization of marijuana or any of the things Senator Gordon said, but I want to share with you for a moment some experiences that I have experienced with mandatory jail sentences.

We have many new Senators here this morning that may or may not recall that in 1968 or 1969, the Florida Legislature through a waive of emotions imposed three year mandatory jail sentences on anyone caught with any marijuana whatsoever. We thought we were doing the right thing.

President Jerry Thomas came along about two years later and took the Senate on a field trip to Apalachee Correctional Institution, a few miles west, and let us view firsthand some of the people that we had placed in the prison system for three years with no chance of parole. We were appalled at what we had done.

We recognized that by taking this latitude away from the courts, that the only thing we could do, sensibly, was to come back and repeal that particular three year mandatory jail sentence law.

It was a very difficult thing to do, because the wave of emotion throughout the United States was still very strongly against marijuana.

But the Legislature stood very tall in that hour and did what was the right thing and repealed that ridiculous three year mandatory jail sentence requirement.

Just a couple years ago we went through the same thing with the use of a firearm in the commission of a felony.

Now, many of us thought at that time, that that would stop or slow down or arrest many of the armed robberies that were taking place in our communities, both large and small.

I don't have any figures as to whether or not the number of armed robberies has been retained or restrained, but let me tell you what I am convinced of.

The number of unwanted, needless murders with people that are robbing stores, supermarkets, gas stations and what have you, throughout Florida, has dramatically increased.

About a mile from my home in Jacksonville, there's a small curbside market. About two or three years ago two armed robbers, about five o'clock in the afternoon, entered this little establishment with .38 pistols, herded

the woman of the owner, who was tending the store at the time, and a customer into the cooler after having robbed the cash register of a hundred dollars or so.

Shot both of them in the back of the head; miraculously they both lived.

It was stated at that time, by one of the people, "Leave no witnesses. With a mandatory jail sentence the best thing to do is to exterminate those right there on the spot."

We have had throughout Florida and in Jacksonville, that I can recall, many, many similar instances where human beings lives were needlessly snuffed out, because those criminals knew that if they left a witness they faced a mandatory jail sentence.

We had one within three weeks ago, a young woman, mother of small children, abducted in a 7-Eleven, two or three o'clock in the morning, needlessly murdered.

These two people were apprehended, not because of the fact that there was no witness, but the fact that someone got scared and went and told the Sheriff about it.

Now, let me tell you what concerns me with mandatory jail sentences like this. Twenty-five years for over a thousand pounds, or whatever the case may be.

[Illegible line] is not because of one point or two point or five point million dollars for enforcement beef-up. But we will have to double the death benefits for all of our law enforcement officers in Florida. Can you imagine for one moment what will happen to an agriculture station somewhere out on the highway late at night and a truckload of marijuana comes through, and that unarmed agricultural inspection officer chases him down and he's got two thousand pounds and knows if he's caught that's twenty five years. Do you think he will hesitate for one moment to snuff out that man's life?

I submit to you they will not. I believe that there are better ways to do what Senator from the 22nd wants to do. And as pointed out by Senator Childers, I think all of us are strongly committed to beef up our enforcement agencies, give direction and give some hard words to the

courts to impose stiffer and longer sentences for those involved than it is to take away the cornerstone of one of our branches of government and say that you do not have the latitude or the intelligence to impose sentences as they should.

For those reasons and many more, Mr. President, I know that this is an emotional thing and the Senate's going to think in the eyes of the world we are doing right, but I submit to you if we do what obviously will happen here this morning, some Senate and some House in future years will come back and undo this as the result of the unwarranted slaying of many of our police officers in Florida.

Senator Myers: Mr. President, purpose of my rising is a parliamentary inquiry. We've been hearing a lot of final arguments on the bill and really all that we're on now is an amendment relating to an Appropriation. I simply want to reserve some time to speak on the merits of the bill after we dispose of this amendment.

SENATE PRESIDENT: Does everybody understand the amendment of the Senator from the 35th is an amendment to increase by two million dollars in the Department of Law Enforcement.

Those in favor of the motion, signify by saying aye. Opposed "No".

Amendment is defeated. Voice by Senator Myers, on page three, line seventeen through twenty-three, strike those lines and renumber subsequent sub-sections.

SENATE PRESIDENT: Senators' recognized to explain the amendment.

SENATOR MYERS: Mr. President, Senators, this amendment strikes from the language of the bill the portion that says that the sentence, the three year mandatory minimum sentence shall not be suspended, modified, or revoked, and it allows the Judge in his discretion in case, on a case by case basis, as we do with a murderer, to determine whether there's going to be - or the Parole Commission - to determine whether there going to be a parole sometime during the three years, or probation or set forth by the Judge, initially.

What we are saying in this bill to prosecutors is, that if you use this statute, you must send the person away for mandatory minimum sentence of three years.

Prosecutors have consistently told us that mandatory minimum sentence statutes are useless, because many times they can't get juries to convict and they don't like to use them. And in all probability they will not use them. They have very seldom used the gun statute that we passed, as you see in the fiscal note here.

So, number one, it is futile to put a statute on the book that your prosecutors are reluctant to us because they don't have the right tools that we will intentioned, wanted them to use.

Second of all, it is ridiculous for us to sit here as a Parole Commission, a doctor, a psychiatrist or correctional officer, and act as a legislator, a judge and a parole commissioner or a corrections officer all in one hat in saying that we have the facility to determine when a person in prison is able to be rehabilitated or is able to provide us with certain information to lead a taxpaying citizen's life or not before the crime is even committed.

Third, you might be interested to know that we don't even provide mandatory minimum sentences for murderers, except for one where there's a twenty-five year mandatory minimum sentence for robbers, for burglars or for all the other heinous crimes you see in the books that are felons now. You don't provide mandatory minimum sentences, but yet you say you're going to provide a mandatory minimum sentence for what is commonly deemed to be a non-violent crime.

Now, Senators, lest this get to be an argument, seemingly an argument between pro-pot-legalization and anti-marijuana people on the floor, let me just tell you, number one, that I have a great amount of respect and admiration for Senator Donald Childers and Senator Spicola, as a matter of fact I have co-sponsored a bill this season with Senator Childers to raise the drinking age back to twenty-one. (Illegible line) that bill because he wants to put it into another form, but I may pursue the bill anyway, because I strongly believe we ought to, that

we were a little precipitous in lowering the drinking age when we lowered the age of majority down to eighteen. Let not this argument on this floor get into an argument between hard-line people on crime, hard-line conservative versus liberals, pro-pot versus anti-pot, because that is not the case.

Look at a criminal statute from the stand-point as to whether or not we really want to carry out, whether it will really carry out our intent and purpose and what we want to do.

If you have a law that is so rigid, that it's unusable by prosecutors or the courts, then it's counterproductive to say that you're really doing anything worthwhile in trying to stop drug smuggling.

And all of us on this floor, I believe Jack Gordon included, in spite of some adverse remarks that were made a minute ago, which I do not think were appropriate, are against crime, against drug smuggling, against drug trafficking, that's not the issue here. The issue is whether you have an appropriate workable criminal statute that our prosecutors and courts and prisons can use and that our legislature can be proud of in the future to say that we weren't just soap-boxing and making political speeches, but that we were really giving somebody a tool to enforce the law that we want to be enforced.

SENATE PRESIDENT: Senator from the 22nd for what purpose do you rise?

SENATOR SPICOLA: To oppose the amendment.

SENATOR PRESIDENT: Senator from the 30th? Senator Poole.

SENATOR POOLE: I just had a question of Mr. Myers.

SENATOR SPICOLA: I yield.

SENATOR POOLE: Senator, yesterday in the committee, we had testimony on this bill, and would you believe me that the prosecutors were there represented and they were very much in favor of this bill, as well as all of law enforcement.

SENATOR MYERS: Well, no, Senator, I really don't

believe that. I might believe that some prosecutors in some counties are in favor of mandatory minimum sentences, but you will find -- I've been on these committeess for fifteen years -- that the prosecutors are split, and a majority of them will tell you, in appropriations and otherwise, throughout the course of the years, that they do not like mandatory minimum sentence. Mr. Gerstein, for years down in the 11th Judicial Circuit, has told us for years that he was never able to utilize well mandatory minimum sentences and he doesn't like them.

There are other prosecutors who will tell you the same thing, so you might have had some that said that, but I will tell you that there is not a unanimous opinion among prosecutors about mandatory minimum sentencing.

The mandatory minimum sentence goes two ways:

One is up front, the Judge can't put anyone on probation -- that may or may not be wise. What you are also saying is that the person cannot be paroled.

SENATE PRESIDENT: Are you finished, Senator?

SENATOR POOLE: Yes, sir.

SENATE PRESIDENT: Senator from the 36th, for what purpose do you rise?

SENATOR STEINBERG: I would like to speak against the amendment.

SENATE PRESIDENT: For what purpose does Senator Dunn rise?

SENATOR DUNN: Against the amendment.

SENATE PRESIDENT: Senator Spicola recognized first - Senator from the 36th, then Senator from the 10th.

SENATOR SPICOLA: Mr. President, Senators, briefly this is just another amendment by the few on the floor here that have what I feel are not the strong prevalent view of constituents as to our drug laws that will actually in this amendment, actually goes to the heart of this bill, because, if this amendment is adopted you, in effect, will go back to the existing law. And, if it's adopted, the whole concept behind this bill -- the whole idea that when this guy that pilots the boat in or pilots the plane in, that when he is apprehended and when he is

sentenced to a minimum mandatory sentence, and when he hears the jail door slam shut, he will not know, if this amendment passes, he will not know that he will be in there for three years or ten years or fifteen years.

Then the whole incentive, the whole object of the bill to make him cooperate, so we can for once move from just apprehending the mules and can move up to the thoroughbreds, to apprehend the generals instead of the privates in this State, that will not be available and with this amendment there is no sense in passing this bill.

Now, under the law, and Senator Myers knows this, if this law is passed -- under this law the prosecutors still have the option of other existing drug laws and they can pick and choose, but they are given this option.

And, we did not hear from on State Attorney -- and particularly we know of the support of your present State Attorney for this bill and your present State Attorney was instrumental in all of this program that Governor Graham has now to beef up FDLE, to beef up the State Attorneys to try to do something about this drug problem.

You know, we've heard some talk about the fiscal impact. Isn't it strange, in Dade County, I'll give you one statistic, in Dade County in the last six months, there was fifty-nine murders -- that's the county that is represented by Senator Gordon and Senator Myers. Fifty-nine murders, Senators. And the Federal Drug Enforcement Administration estimates of those fifty-nine murders, over forty were drug-related.

Now, I ask you, Senators, what is the fiscal impact of human life.

Now, you think about that when you vote on this amendment and the rest of it.

Give this to the law enforcement, Senators, they are asking for it, they need it, they deserve it, and Florida can no longer be what it is today and have the reputation of what it has today as the drug capital. I urge you to defeat this amendment.

SENATE PRESIDENT: For what purpose does the Senator from the 35th? Sir, do you yield?

SENATOR SPICOLA: I yield.

SENATOR GORDON: Senator, wouldn't it make just as much sense -- if we just did a little exercise in logic here.

Wouldn't it make just as much sense to say that we wouldn't have had forty, or whatever it was -- forty of those murders, if marijuana was legalized there wouldn't be any reason for those people to shoot each other, would there? So, it seems to me your argument could be used in either direction.

SENATOR SPICOLA: Well, you could also follow that argument, Senator, by seeing the thousands and thousands of lives, young lives, that are ruined by the used of hard drugs and other drugs, that are ruined.

And, what is the fiscal impact of those, so it could use that logic, too. If, you legalize all the drugs, as you would.

SENATE PRESIDENT: For what purpose does the Senator of the 4th rise?

SENATOR THOMAS: Point of inquiry. Will Senator Spicola yield?

SENATE PRESIDENT: Senator yield?

SENATOR SPICOLA: Yield.

SENATOR THOMAS: Senator, I want to concur with you. I don't think based on the staff analysis it would indicate to me that there's not going to be much fiscal impact on the one hand. Which would bring up the question, where does the bill really -- the statistics would indicate that some four hundred and fifty-three marijuana cases were brought into the correction system in the fiscal year of 77-78, of which of those four hundred fifty-three, ten to twenty of them were at a level of a hundred pounds or more.

Where does the bill really get to the hard-core drug traffic people?

SENATOR SPICOLA: With those few that you mentioned, those few that now may get out in a year and half, that may under this bill, sentenced to three years or ten years or fifteen years, to those that will be sentenced under this law and they know they are going to be in

there that long and they know that the general is not going to finance them and guarantee them a job for that length of time, those people may get us to have those people to cooperate and get the generals that we haven't got to under our existing law.

SENATE PRESIDENT: For what purpose does the Senator from the 20th rise?

SENATOR GRIZZLE: To ask a question of --

SENATE PRESIDENT: Senator from the --

SENATOR GRIZZLE: Senator, this bill is fine, as far as it goes, but I think there is something sadly lacking. So we're going to get the privates and the lieutenants and the corporals, but what happens to the general, I mean nothing happens to the general under this bill that's bad enough.

SENATOR SPICOLA: Yes, because, if the private squeals and if that leads to the conviction of a general, he will be subject to the mandatory sentences and those are the big ones, those are the ones that the more severe penalties will apply to, because they are accessories and principals and they would be subject to the severe penalties in this bill.

SENATE PRESIDENT: Senator from the 36th recognized.

SENATOR STEINBERG: Thank you, Mr. President. I think we're -- I think Senator Spicola said most of what I would want to say, Mr. President, but I just want to go into one area.

Senator Myers is talking that we should not use the three year mandatory minimum, which is the only thing his admendment tends to strike from the bill. Without that, however, the bill does not have the effect that Law Enforcement, the State's Attorneys and Governor Graham wants the bill to have.

What you have to realize we're dealing with other than the emotional issue, this is an economic crime.

You're talking about, in the marijuana area, a hundred pounds of marijuana. You're dealing with over a quarter of a million dollars worth of product that this person is being caught with. You're dealing with a half million

dollars worth of hard drugs based on what the bill is talking about.

These people, when your dealing with that kind of numbers, have no problems today going into the criminal justice system, the mule, the person who's carrying that amount of drugs from the airport to the distribution center that is being grabbed, and sit for six months or eight months, when he has been dealing with a quarter of a million dollars.

They wouldn't earn that amount of money on the street. In other words, economically, it's better for them to go to jail and get -- be paid when they leave jail by the person who they have been working for higher up.

What this bill is designed for, for the first time, to try to get that next run, up on the ladder. The person who is financing the person who is masterminding by saying, Look, it doesn't matter that he promised you or she promised you to cover you while you're in prison. And then when you get out of prison you've got fifty or sixty thousand dollars in the bank for you. And don't worry about the time you spent, we will take care of your family, we'll give you a job when you come out. If these people feel they're not going to get out for a period of time, they're going to have to spend that time in jail, then they might go to that State Attorney and say, Look, I'll tell you who the next one up on the rung is if you'll let me out of jail.

That is what this bill does. It allows the State Attorney and law enforcement to make a deal after the person is in jail.

This is something that does not exist today in the law. Today when you find someone guilty and you sentence them to jail, after the first sixty days you no longer can make a deal with them to let them out to get them to turn state's evidence or to do anything.

This bill says, Look, we'll put you in jail mandatorily for a period of time, but if you will help us in prosecution, we can amend that mandatory jail sentence. It's a way of using the law to help law enforcement. If you take away the mandatory provision on the law,

you're basically putting us back to square one in our drug enforcement.

And I am -- you know if -- most of you know, when I've been a member of the House I've supported the decriminalization of marijuana. That's not the issue here today, whether we're going to do anything with the felony or the misdemeanor question in the use of pot. That's not before us today.

We are dealing with sentences for the people who are transporting the large amount of drugs. We're not talking about the users. The user is not someone who's going to have a hundred pounds of marijuana in his possession, or he is going to have five grams of heroin or twenty-eight grams of cocaine. That's not what we are talking about. The average user is not walking around in the cocaine area. You're talking about a quarter million dollars or more of cocaine. Depending on the purity, you could be talking over a million dollars' worth. That's not the type of person we're getting at in this bill. And I think if you go with Senator Myers' amendment, you're defeating the bill. You've got to vote down the amendment, then pass the bill as now amended, and let's get the message out. You know, Hertz and Avis always talk about the number one, and one's striving to be [illegible line] we should strive not to be number one and this bill is a move in the right direction.

SENATE PRESIDENT: Senator from the 10th, Senator Dunn is recognized.

SENATOR DUNN: Mr. President, members of the Senate, I, too, would like to oppose the amendment pending and in the course of these comments address two of the principal issues of the bill itself.

First, let me agree with those Senators who have raised some question --

SENATE PRESIDENT: Can I interrupt you just a minute Senator? If your message -- we've already had time to debate the bill itself, so if you keep limited to that -- maybe you have to make your point -- statement, but we would like to limit it to just the amendment if we can. We'd like to move this along and get it out of here, if

we're going to get it out.

Go ahead, Senator.

SENATOR DUNN: I would say that I agree in general principle with some of those lawyers and other senators who have raised a question about the utiltiy of mandatory minimum sentences.

Mandatory minimum sentences have been used in emotional frenzies by legislative bodies from time to time to address emotional problems. They have not been generally very effective in reducing crime.

There are, however, exceptions. I served under an appointment of the Chief Justice on a committee dealing with the review of Florida's sentencing code.

One of the recommendations that that committee is recommending is that Florida's sentencing process be restructured and we go to what is called a matrix system of guidelines.

Part of the review of that committee, and part of the review that our Committee on Judiciary - Criminal last year was involved in, was an analysis of the effectiveness of mandatory sentences.

Now, Senators, I reviewed a very excellent study done by Harvard Law School on the question of the effectiveness in reducing crime by the mandatory minimum sentence provision and the Massachusetts law dealing with with gun control.

One of the first scientifically done reports that I have seen on the issue, that report indicated that, yes, mandatory minimum sentences are effective. They will reduce crime if a couple of things occur.

First, if the legislative body does not overuse and apply the concept of mandatory minimums to everything that comes down the pike.

Secondly, if the legislative body and if the Governor publicizes the fact that mandatory minimums are in fact, to be imposed in certain instances, and in those cases that study indicated that in Massachusetts there was in fact a reduction in use of firearms just as we have found somewhat less so scientifically in Florida, that with our three year mandatory we have in fact, reduced, we

believe, substantially, in my opinion, the use of firearms in the commission of certain felonies.

Now, I believe, that if we use sparingly, selectively, and rationally the question of mandatory minimums we can have the impact we desire, and that is to reduce crime.

Why would you use it in this instance? You would use mandatory minimums in this instance because, as has been pointed out by Senators Spicola, Steinberg, and others and very well by the Governor, we are dealing with an economic crime here.

We're not dealing with a simple question of possession of two or three grams of marijuana.

We're not dealing with a situtaion that occurs very frequently in this State by people who use small amounts of marijuana and consume it for their own purposes.

[Illegible line] dealing with the individuals who feed on the weakness of others.

We're dealing with the worst in society, the criminals that make their money in organized crime. And organized crime is, by definition, the organized criminal conspiracy for profit.

Now, in order to make an impact on organized crime, what we have to do is look at the causation of that economic phenomenon.

A couple of professors at John Jay University in New York wrote a good book dealing with the economic causation of crime very much in point to organized crime.

What it says, it says if you are a policy maker what you ought to be considering is how you address the causation from the point of view of the economics of it, just as Senator Gordon has pointed out, but in my opinion, quite on the other side of this issue.

They say, in effect, look at causation, look at the criminal as a rational being.

People who are in organized crime are rational, they're in it for a purpose, they're in it to make a living, and they're making substantial money.

Now, how do you cut into their business? The way you

cut into their business is to look at the cost benefit analysis. So long as we permit the benefit of crime to be substantial and the cost to be insubstantial, who would not be in business if you were disposed? Who would not be able to make a profit in organized crime in this State?

I guarantee you that unless and until we increase, the cost of doing business in organized crime, we will not keep them out of the State however much money we put in organized crime repression and suppression activities in DCLE and others.

What we need to do is recognize we're got flexibility in organized crime in the criminal justice system and look at it analytically.

Number one, as has been pointed out by Senator Spicola, a person dealing in large amounts, hundred pounds of marijuana, one ounce or more of cocaine and other hard drugs can make substantial sums of money. The committee heard testimony to the effect that these mules, the people who the importers, the wholesalers, the people connnected with organized crime can make two hundred thousand dollars a clip. Now if you can make two hundred thousand dollars a clip, you can run the risk of going to jail for eighteen months.

You can run the risk -- as a matter of fact, your cohorts in crime will pay you, as we heard in the testimony before the committee. They will pay you fifty thousand dollars to be quiet and stay in jail. And I guarantee if you can make two hundred thousand dollars in eighteen months, that's a pretty good risk for some of these people.

Now what do we need to do? We need to recognize that on the cost side we've got some flexibility in the system that is not perfect. We know there is sometimes a very unlikely likelihood that a person is even going to be apprehended.

The large shoreline that we have, the problems of importation, it's tough to catch anybody coming in here, trying to bring in large amounts of marijuana.

So there is a benefit there and they're running the risk.

They're taking the gamble. There is a benefit that even if they are apprehended they may not likely be arrested, because of the problem in making the arrest.

After they are arrested there's some flexibility in the system, the excellent battery of lawyers, there's some likelihood that they will bet on, if you will, that they will not be prosecuted or if they are prosecuted they won't be convicted.

MC-9/8/79

SENATE TAPE - COPY SESSION 4/5/79
(SENATE BILL 83)

"Read the next Bill

"Senate Bill 83, a Bill to be entitled, 'An Act Relating to the Possession of Controlled Substances'. . .

"Senator Childers is recognized.

"Thank you, Mr. President. Senators, this Bill was and is last year, the latter part of the Session, and at that time we did not feel it was a pressing issue to be brought before the Senate and also the fact that we did not have a House companion. I think the question that most people are asking today, is why do we need mandatory prison sentences for drug smugglers? According to a new recent news report, Florida's number one industry dollar wise, is drug smuggling. We have reports that only 10% of these drug smugglers are now being apprehended in the State of Florida. This means that there is a 90% chance of an individual, specially the big drug smugglers getting free, and making huge sums of money. There are several reasons as to why we are only apprehending only 10% of these drug smugglers; one is the lack of police manpower; the other is because we have hundred of miles of unprotected coastlines in the State of Florida,

and we have large areas where an airplane can land or either make drops of marijuana and other type of drugs; I've met with State Attorneys, law enforcement agents throughout the State, and they all agree that drug smuggling is the most major problem facing the citizens of the State of Florida today.

"I don't thing we can wait until next year to do something about this. I hope that all of you that are listening now and have children in our schools and high schools and in our colleges, I have reports in Palm Beach County, that there the high school students in some high schools there are a percentage of 80 to 90% of all students that are on some type of drugs. This is tearing at the very foundation of our society not only in Florida but of the nation as a whole. We are seeing that our elected officials in Washington are not taking any action on this problem, and I think now we have a chance in Florida to move forward and make sure that this here problem is addressed. Let me just give you a few example of what kind of money is involved. In Palm Beach County this past year I give you some of the figures on the amount of marijuana that certain law enforcement agencies were able to confiscate; 10,000 pounds; ½ tons; 2,000 pounds; 3500 pounds; 4400 pounds; 25,000 pounds; 9200 pounds; 15,000 pounds; 98,000 pounds; 14,500 pounds; 57 ½ tons on one vessel.

"This one vessel was confiscated with a street value in marijuana in excess of $25,000,000. In Fort Myers over the past few years there have been confiscated over 500,000 pounds of marijuana with a street value in excess of $225,000,000. The list goes on and on. I feel that if we take the appropriate action today that we will certainly reduce the amounts of drug smuggling into the State of Florida.

"All of you have on your desk a newspaper article which is in the Palm Beach Miami Herald section on Friday, March 3, 1979. The headline reads, "Police protests

release of guilty pot smuggler''. This top smuggler was caught with 1400 pounds of marijuana; he is not serving one day in jail. The Judge says he is an outstanding family man and he did not want him to have a police record. We are seeing that the Courts are not acting as they should dealing with this problem. I think now we in the Legislature must come forward and do something to correct this problem.

''Senator yield?

''Yield.

''Senator, apparently you are trying to reach the problem of getting people with over 100 pounds of marijuana and a mandatory jail situation, is that correct?

''That's correct.

''I notice that the summary of the Bill, and this is what bothers me, sir, is likely that most offenders would plead guilty to a lesser offense during the plea bargaining so the proposed Legislation would have very little, if any, effect on the present population. Now, if that summary is correct what you are just saying is taking these cases out of the Court and putting them in the hands of the public defender and the Assistant Prosecutor and you are going to be sure that none of them are going to jail.

''Senator, there is going to be an Amendment offered on this Bill that will place the Governor's Bill on this Bill; I met with the Governor I met with Senator Pascola (phon.) on this yesterday afternoon and we all agree that this Bill, I think will go a long way in stopping the drug smuggling in the State of Florida.

''Will you yield to one more question, Senator?

''Yes, I would.

"Do you favor plea bargaining rather than Court actions in dealing with crimes; do you think that two guys ought to sit down and do it or do you think that a Judge or a jury ought to do it? I just wonder what your philosophy is on that. . . .

"In a broad sense, I'm against plea bargaining.

"You ought to be against this Bill, then.

"Mr. President.

"What purpose does the Senator pleads?

"To inquire regarding procedure to inquire of Senator Childers.

"I yield.

"Senator you haven't indicated year but you indicated to me earlier and I want to ask you, do you intend to offer a substitute Bill to this Bill that we've seen on our desks?

"(discussion about whether it was the one on the desks this morning - passed out to you in your office yesterday, Committee substitute for Senate Bill 620, which will be offered as an Amendment to this Bill.

"Well as I understand it, that Bill is substantially broader than the original Bill that dealt simply with the 100 possession of 100 pounds of marijuana; this one covers a broad gamut of drugs, and in the drug scheduling Statute, and I'm simply wondering whether or not there is a fiscal note on the Committee substitute.

"This has been Ways and Means.

"It has not gone to Ways and Means, it was heard in the Criminal Justice Committee, 6/20 was, if you look at the

Staff Report there is. . .

"That's the original Bill. . .

" 'Economic Impact and Fiscal Note'. . .

"That was the original Bill but has there been a fiscal note running on the substitute?

"The substitute is the Committee substitute.

"Mr. President, I'm just concerned about the procedure in the Senate; we are now beginning to move a little bit too fast; I'm concerned whether or not the Senate has had a chance to look at this measure in the depth that we ought to be looking at a Committee substitute.

"Mr. President, the Committee's substitute for Senate Bill 620 is identical to the amendment that is being offered to Senator Don Childer's Bill except for the change of one word from marijuana to cannabis; and that of course has no fiscal impact; so the fiscal impact of 620 is the same as the fiscal impact for this amendment to Sen. Childers' Bill.

"What purpose does the Sen. from the 35th arise?

"To state that if the same fiscal impact applies to the proposed Committee substitute as applies to the other, then the Department of Correction estimates the fiscal impact at about $15,000,000 over a number of years, and about $5,000,000 of prison construction and I'll go on and give you the whole analysis, Mr. President, but, ah, it's related incidentally to the point that Sen. Barron raised with Sen. Childers; the question is will they cite the Statute when they charge the people? If they cite the Statute it's going to have that fiscal impact; if the prosecutor doesn't cite the Statute, permits them to go to County jail or something like that it wil have no fiscal impact but it also will have no law enforcement impact

which is what the Bill is supposed to do. So that's the fiscal situation, I'm just waiting until that Amendment comes before us to actually raise the point, but I think that it is important for the Senate, to understand that that is the fiscal situation.

"Senator, I wonder if we could get in proper posture by just reading the Amendment, and then we can discuss the fiscal impact.

"Read the Amendment so. . .

"[Reading the Amendment] - by Senators Piccola and Steinberg [phonetics], strike everything after the enacting clause and insert a lengthy amendment.

"The —— is recognized —— to explaining that at the time to raise a point of order Senator that's after if the Amendment is adopted; there isn't the impact at that point.

"Mr. President, Senators, this Amendment is offered with the consent of Sen. Don Childers, and if you want to follow it I believe it's on your desk; I believe it is the same I indicated earlier as a Committee substitute for Senate Bill 620 and what the Bill does is expand what Sen. Childers original concept of dealing with 100 pounds or more of marijuana; this expands the Bill to dealing with other controlled substances such as cocaine, heroin, morphine, etc., and what it does is expand that concept of minimum mandatory sentences for a new crime which is defined, as three new crimes which are actually defined in the law; one if trafficking in cannabis, the second is trafficking in cocaine, and in the third it's trafficking in illegal drugs; it provides a range of penalties based on the quantity of the drugs and the range would be from three calendar years and a fine of $50,000.00 up to a maximum well in the case of heroin to a maximum of 25 calendar years and a fine of $500,000.00

"Now, why do we need this law? If you want to get in my opinion to the heart of the economic base of organized crime in Florida, Senators, you are going to have to get to the crime of drug trafficking and now under our present laws, there is really a void; we are at times arresting maybe the corporals, maybe the sargents but we never get to the majors, and the colonels, and never to the generals. The reason being for example somebody comes in with or is caught or the man is actually used because he can fly a plane or captain a ship and he has 100 pounds of marijuana and he comes in, he is caught, he might get sentenced to five years; he probably will be out in 18 months; one one load alone he could make from $300,000 to $500,000 of durgs or on 100 pounds of marijuana so the risks of getting caught and being in jail for a short period of time makes it worthwhile economically. Economically, all the law enforcement tells us that the very heart of organized crime is drug trafficking; the Miami Herald alone estimated that over five billion dollars a year in illegal drugs trafficking in Florida. We got the unfortunate reputation as a drug haven. Sixty Minutes not too long ago talked about Florida that way. The reason for the Bill is to make the penalty stiff enough that that guy that flies that plane in, that pilots that boat in, and when he hears that door slam and he know that he is going to be there for sure for 3 to 25 years, is going to make it worth his while to say who was financing the operation, where he got the money from; and I think it will contribute significantly to our drug problems, to solving our drug problem in Florida.

"We can't in Florida no longer tolerate the reputation of being a drug haven. I think that we should get this Bill passed; I hope it will be the first Bill enacted by the Florida Legislature and the word will go out throughout the world that we want to play hard ball in Florida with hard drugs so I urge you to adopt the Amendment.

"Senator from the 35th.

"Will the Senator yield for a question?

"Senator you are a former State Attorney and you have not lost your love for that particular office, so would, how would you know anybody who was arrested would necessarily be charged under the Statute?. . . .

"Since there are other Statutes under which people can be charged. . . .

"We do not know that they'd be charged under the Statute, but since law enforcement almost unanimously, in fact, I know of no one in law enforcement that does not support or want this vehicle; since they want it you must assume Senator that they plan to use it. . . .

"Well, couldn't you also make the assumption that since the majority or a significant number of jobs in law enforcement are there because people are going around chasing marijuana smugglers that the stronger you make the law the greater the opportunities for corruption, and the more jobs you need and the more promotions people get and everything else. Law enforcement is not necessarily just interested in enforcing the law; it's an institution like every other that may simply look for its own self-aggrandizement, don't you see that as a possible explanation for law enforcement support?

"But I don't accept that explanation, I'm sorry that you do. . . .

"Well, I think Senator that you have a flawed understanding of institutional behavior, but what I want to point out to you in a question of whether they'd be charged the Department of Correction says that two out of three people who could have been charged under the *Florida Statute* 775.087, the gun law, were not charged under the Statute, which is why a significant number of robberies, armed robberies are not getting the mandatory jail sentence, and I just want to know in law

enforcement was all in favor of that, and I want to know why law enforcement is . . . you're sure they are going to use this law and not other law so that this law is in fact an answer. . . .

"Well, you mentioned the earlier three year mandatory firearms law and you know I remember the fiscal note on that was something like $300,000,000.00 a year, and it is in fact costing us less to prosecute those kinds of armed robberies. . . .

"Well, what I'm telling you, Senator, is the reason is less is that two thirds of the people who could have been prosecuted under that law are being prosecuted under the lesser law and it's not being used by the prosecutors and it's not being used by law enforcement, and I'm asking you what makes you think that the drug law is going to be any different that the gun law?

"It gives them that option; the State Attorneys are for it; it would seem that if they are going to use it; there's much more support for this Bill than I remember being for the armed robbery Bill that was quite controversial and I'm sure that if they did use it, and they did catch a lieutenant, who did cooperate that we would for the first time get a general, that would make it worth its while. When you are talking about five billion dollars a year drug trafficking in this State, and that the few tools that we have to fight that, we go after----financially in this State, you know, when they are making five billion dollars a year and what we could commit is a---to that, let's at least give them the legal tools or alternatives if you please for that. . . .

"Senator, are you aware of the, the story . . . I'm older than you and you may not remember this, but you are aware of the historical situation in 1932 when prosecutors were saying the same thing about whiskey, and liquor and people were bringing . . . the prices were lower in those days, so it was probably not a five billion

dollar business, but Florida was a great haven for liquor smugglers and the essential answer that came regardless of the sentence was that we made it legal and I don't know why you want to take the profits out of the situation, you don't take the analogy of Prohibition and apply it here since you are dealing primarily in marijuana with a drug that's no longer a Schedule 1 drug but is in fact a Schedule 3 drug.

"Senator, 1932 was way before my time but I also can recall or don't recall that there was a minimum mandatory sentences at that time for alcohol, illegal drug smuggling, nor was ah, any incentive at that time as provided in this Bill that if the man that was incarcerated cooperated that he would get some relief. . .

". . . Senator from the 35th . . .

"To ---- over again, and all those things were in the law, we had, all those, all those kind of business, it was the finest hour of the Coast Guard, that was the great expansion of the Coast Guard in this country, to hold off the smuggling by boat, we just didn't have airplanes, so we had somewhat different technological situation and I a practical matter we had the same situation and I think you really ought to examine, if you want to, if, if you really want to do away with the drug smuggling, and not just raise the price of the product, which is what you are going to do here, you are going to restrict the supply, raise the price, and all you doing in this Floor is raising the profit of the people in the drug business. . . I wonder why you don't look at the alternative, as a good economist and say, why don't we simply lower the price, take the corruption out and solve the problem that way,

". . . . . .on the desk. Read the Amendment.

"By Senator Thomas on page 3 of the Amendment line 21, strike the words, 'or Statutory gain time under Statute 944.275'.

"Mr. President, Members of the Senate, I hope that the sponsor of the Bill would accept the Amendment, it goes to the heart of discipline and control and management —— statutory gain time does with the prison system; one of the things that I think I should caution you on and remind you of, some three or four years ago I think that it was Sen. Williams and others visited many of the prisons and created the Prison Industries Work Program. It's somewhat geared to statutory gain time and contract parole; if you take that away, you still got a very tough Bill and even under the best conditions of statutory gain time built up the penalties are beyond and more severe than what you have now; so, Senator, I hope that you would ... let's leave that in the Bill; that Amendment is acceptable.

"Any objection to that Amendment? Any objection?

"No objections; the Amendment is adopted. Are there Amendments?

"Any Amendments up, now? Are more?

"Any more debate on the Amendment? As amended? Any more debate? All those in favor of the Amendment vote "aye" (chorus of "ayes"); opposed? The Amendment is adopted.

"File the Amendment.

"----The Senator from the 35th has raised a point of order on this Amendment, and its precedence always do, Senator, they are very fine precedents going both ways. I think what we'll do until I get further notice will just temporarily pass this Bill and come back to it; I want to make sure when this one will ride; the, ah, we have had ——— and such scholars and knowledgeable people of the Rules whose longest term in office in the Legislature today, the Senator from the 3rd, and his famous ruling, and we have others going the other way; so, you wait and I'll try to get in a ruling in--Senator Barron, Senator Johnston and Senator Ware (phon.) will give you some advise on that, I'd appreciate it.

"We'll temporarily pass that Bill, ah, come back to it.

"Senator from the 28th.

"Will we come back to this Bill today?

"We'll try to.

"Thank you.

"Senator Barron moves we temporarily pass until... all those in favor, say "aye" (chorus of "ayes"); opposed (silence); read on the next Bill.

(BEGINNING OF BILL 16 - "An Act Relating to the Florida Highway Patrol Station in the City of Lakeland).
(E N D O F T A P E)

The Gainesville Sun April 7, 1979, 1-A, cl. 1

"Graham Signs Stiff Drug Bill Into Law"

TALLAHASSEE (AP) -- Gov. Bob Graham won his first legislative contest on Friday as the House unanimously approved his plan for cracking down on Florida's notorious drug business by imposing stiff sentences on traffickers.

Graham put his signature on the bill just two hours after the House voted 116-0 for a get-tough-on-drugs proposal (SB 83) that had sailed through the Senate the day before.

"If people want to be involved in the drug traffic, they'd better do it someplace else than Florida," Graham told reporters shortly after he signed the bill.

"This is a very visible action in our commitment to fight organized crime."

The measure became the first new law to result from the 1979 session which began on TUESDAY. It also was the first legislation signed by Graham since he became governor in January.

House Speaker Hyatt Brown told reporters at a news conference later in the day that Graham had appealed to legislative leaders to pass the bill quickly because of an "overriding need" to have it on the books before next week.

Brown refused to explain but hinted that the governor might have occasion to use the statute in the near future.

The new law hopes to cut down on the huge amounts of illegal drugs smuggled into the state from South America and Mexico by making it easier for law enforcement officials to win more conviction of drug-smuggling masterminds.

The law will establish a sliding scale of minimum mandatory prison sentence ranging from three years to 25 years for persons convicted of trafficking in large quantities of marijuana, cocaine or hard drugs such as heroin.

The only way such convicted felons could escape the mandatory sentence would be to turn state's evidence -- cooperate with law enforcement officials trying to indict higher-ups in the drug-smuggling world.

Supporters have said they hope the opportunity to escape from the mandatory sentence will convince some convicted drug smugglers to turn state's evidence on their underworld bosses.

Supporters also have said the law will help to counteract the embarrassing national publicity Florida has received about its estimated $5-billion-a-year drug-trafficking industry.

"Today we have an opportunity to drop a bombshell in the minds of the drug-smuggling business in Florida and the United States," said House Criminal Justice Chairman Robert Crawford, D-Winter Haven.

"We're sending out a pretty strong word to drug traffickers that if you get caught involved in it, we're going to get to you."

Motion to Dismiss or Affirm

Supreme Court, U.S.
FILED
APR 12 1982
ALEXANDER L. STEVAS
CLERK

CASE NO. 81-1351

IN THE

Supreme Court of the United States

October Term, 1981

STEVEN MICHAEL SMITH,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether Section 893.135, Florida Statutes is unconstitutional in that it is violative of the constitutional protections afforded by the Due Process clause; the Equal Protection clause and the prohibition against self-incrimination and cruel and unusual punishment.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED..... i

TABLE OF CITATIONS..... iii-v

PREFACE..... vi

OPINIONS BELOW..... 1

JURISDICTION..... 2

ARGUMENT..... 3-19

CONCLUSION..... 20

TABLE OF CITATIONS

UNITED STATES CASES — PAGE

Alander v. Florida,
U.S.Sup.Ct.Case No.81-423.....6

Albernaz v. United States,
___U.S.___,101 S.Ct.1137 (1981)....19

Blalock v. Florida,
U.S.Sup.Ct.Case No. 81-712.....6

Bordenkircher v. Hayes,
434 U.S. 357 (1978).....14,16
17,18

Brady v. United States,
397 U.S. 742 (1970).....13,18

Broaderick v. Oklahoma,
413 U.S. 601 (1973).....9,10

California Bankers Association v. Shulty,
416 U.S. 21 (1974).....9

Clarke v. Florida,
U.S.Sup.Ct.Case No. 81-834.....6

Corbitt v. New Jersey,
___U.S.___,99 S.Ct. 492 (1978).....16,17
18

County Court of Ulster County, New York
v. Allen,
___U.S.___,99 S.Ct. 2213 (1979)....8,9,
10

Cox Broadcasting Corp v. Cohn,
420 U.S. 469 (1975).....6

TABLE OF CITATIONS
(CONTINUED)

UNITED STATES CASES — PAGE

Flynt v. Ohio,
___U.S.___,101 S.Ct. 1958 (1981)...5

Lefkowitz v. Cunningham,
431 U.S. 801 (1977).....13

Leicht v. Florida,
U.S.Sup.Ct.Case No. 81-836.....6

Locke v. Florida,
U.S.Sup.Ct.Case No. 81-960.....6

Marshall v. United States,
414 U.S. 417 (1974).....19

Massachusetts Board of Retirement v. Murgia,
427 U.S. 307 (1976).....19

McGautha v. California,
402 U.S. 183 (1971).....13

North Carolina v. Alford,
400 U.S. 25 (1970).....13

Roberts v. United States,
___U.S.___,101 S.Ct.1358 (1980)....12

Rummell v. Estelle,
___U.S.___,100 S.Ct. 1133 (1980)...19

United States v. ManDujano,
340 U.S. 367 (1951).....13

Wall v. Florida,
U.S.Sup.Ct.Case No. 81-782.....6

TABLE OF CITATIONS
(CONTINUED)

OTHER AUTHORITIES — PAGE

State v. Benitez,
395 So.2d 514 (Fla. 1981).....3,7,11

State v. Leicht,
402 So.2d 1153 (Fla. 1981).....3

State v. Newman,
405 So.2d 971 (Fla. 1981).....3

State v. Thebeau,
405 So.2d 973 (Fla. 1981).....1

State v. Werner,
402 So.2d 386 (Fla. 1981).....3

State v. Yu,
400 So.2d 762 (Fla. 1981).....3

§28 U.S.C. 1257.....2,5

§265.16, New York Penal Law.....7

§893.135, Florida Statutes.....i,1,3,
5,7,10,14,19

PREFACE

The Appellant was the defendant in the Florida trial court and the Appellee in the Fourth District Court of Appeal below. The State of Florida was the prosecution in the trial court and the Appellant in the Fourth District Court of Appeal. In this brief, the parties will be referred to as they appeared in the trial court below.

The following reference is made in this brief:

(A) For the Appendix to the brief of the Appellant.

I

OPINIONS BELOW

The opinion of the Florida Fourth District Court of Appeal reversing the trial court's finding that Section 893.135 Florida Statutes is unconstitutional is reported at State v. Smith, 402 So.2d 1360 (Fla. 4th DCA 1981). There is no official reporter for citation to this opinion.

II

JURISDICTION

The Defendant claims jurisdiction herein based upon 28 U.S.C. 1357(2).

III

ARGUMENT

The State is in receipt of the Defendant's jurisdictional statement on appeal from the Fourth District Court of Appeal of Florida, in which the court reversed the trial court's finding that Section 893.135 Florida Statutes is unconstitutional, citing State v. Benitez, 395 So.2d 514 (Fla. 1981) See, also, State v. Thebeau, 405 So.2d 973 (Fla. 1981); State v. Newman, 405 So.2d 971 (Fla. 1981); State v. Leicht, 402 So.2d 1153 (Fla. 1981); State v. Werner, 402 So.2d 386 (Fla. 1981); State v. Yu, 400 So.2d 762 (Fla. 1981). The Defendant now seeks a second review in this Court. The Defendant claims that the mandatory penalties under Section 893.135(1) and the provision for mitigation in Section 893.135(1) in the event of a defendant's "substantial assistance" are violative

of the constitutional protections afforded by the Due Process clause; the Equal Protection clause and the prohibition against self-incrimination and unusual punishment.

A. NON-FINALITY

The present appeal evolves from a circumstance wherein the Florida trial court declared Section 893.135 Florida Statutes unconstitutional in a criminal trial proceeding and thereupon dismissed the charge against the Defendant. The Florida Fourth District Court of Appeal reversed the dismissal and thereby re-instated the charges against the Defendant. There has been neither a trial on the merits nor a conviction of the Defendant. Section 1257(2) of 28 U.S.C. limits the jurisdiction of this Court to. "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . ."Where there is neither a trial on the merits nor a conviction and sentence, this Court has no jurisdiction and the cause should be dismissed. See, Flynt v. Ohio, _____

U.S.___, 101 S.Ct. 1958 (1981); see, also, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). The present cause is identical to that presented in Wall v. Florida, U.S. Sup.Ct.Case No. 81-782, appeal dismissed January 11, 1982 and Blalock v. Florida, U.S. Sup.Ct.Case No. 81-712, appeal dismissed January 11, 1982. See, also Clarke v. Florida, U.S. Sup.Ct. Case No. 81-834, cert.den., March 22, 1982; Locke v. Florida, U.S. Sup. Case No. 81-960, dismissed for want of a substantial federal question, March 1, 1982; Leicht v. Florida, U.S. Sup.Ct. Case No. 81-836, cert. den. March 1, 1982; Alander v. Florida, U.S. Sup.Ct. Case No. 81-423, cert. den. January 25, 1982.

B. THE DEFENDANTS HAVE NO STANDING

In the leading decision in State v. Benitez, 395 So.2d 514 (Fla. 1981) upon which this appeal is based, the State had argued that the Defendants had no standing to argue the constitutionality of Section 893.135 Florida Statutes, because the st tute was a sentencing statute and the Defendants had not even presented motions to suppress and neither had they been convicted. In rejecting this argument the Florida Supreme Court explained that:

"The state argues that, because appellees have not yet been convicted, they have no personal stake in this penalty oriented statute.

To state the assertion is to demonstrate its absurdity. A party subject to criminal prosecution clearly has a sufficient personal state in the penalty which the offense carries. This is wholly unlike cases in which criminal defendants have challenged portions of a statute which have nothing to do with their prosecution. See State v. Millington, 77 So.2d 685 (Fla. 1979); State v. Champe, 373 So.2d 874 (Fla. 1978)."[Emphasis added].

395 So.2d at 517.

Recently, in County Court of Ulster County, New York v. Allen, ___U.S.___, 99 S.Ct. 2213 (1979), the defendant/petitioner upon a due process claim had sought to overturn New York Penal Law §265.16(3), which provides that the presence of a firearm in a vehicle is presumptive of its possession by the occupants. 99 S.Ct. at 2217. The United States Court of Appeal for the Second Circuit had held that the statute was, "unconstitutional on its face." 568 F.2d 998 at 1009. In reversing the Circuit Court of Appeals, the Allen Court again emphasized that:

"A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.

A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment. This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech. That justification, of course, has no application to a statute that enhances the legal risks associated with riding in vehicles containing dangerous weapons." (Emphasis added, citations omitted).

99 S.Ct. at 2223.

See, California Bankers Association v. Shulty, 416 U.S. 21, at 71-72 (1974). The Allen Court went on to consider the facts and circumstances before it and found that the New York Statute constitutional as applied. 99 S.Ct. at 2226-2230. The sine qua non of any facial attack upon the constitutionality of a statute as in the case at bar, is a requirement that the statute may be violative of the fundamental rights contained in the First Amendment. County Court of Ulster v. Allen, supra; Broaderick v. Oklahoma, 413 U.S. 601, at 611-612 (1973).

The Defendant's complaints and the fundamental premise of Section 893.135(1) is directed to the sentencing proceedings and thereafter. The Defendant has not been convicted or sentenced. Given the multiplicity of protections afforded the Defendant in the criminal justice system, including plea bargaining; motion practice and the right to a trial by jury, the Defendant may never be convicted or sentenced for an offense under Section 893.135. Merely because he has challenged the constitutionality of the statute does not render the issue fundamental and properly susceptible to judicial analysis. County Court of Ulster v. Allen, supra. Sub judice, the Defendant's constitutional complaints are inherently premature and devoid of proper standing. Absent any issue regarding freedom of speech, the

facial attack upon the constitutional-validity of Section 893.135, must necessarily be rejected. Id.

In sum, the Florida Supreme Court in Benitez has improperly conferred jurisdiction upon this Court by its incorrect analysis of the Defendant's standing and the ripeness of the present claims for adjudication. This Court should accept jurisdiction in order to correct this serious and repetitive error in the Supreme Court of Florida's constitutional analysis. To do otherwise will only encourage further needless, premature litigation such as that presently before the Court. See, Point "A", supra.

C. NO SUBSTANTIAL FEDERAL QUESTION

Each of the Defendant's constitutional complaints are easily rejected based upon settled principles of federal constitutional analysis. In Roberts v. United States, ___U.S.____, 100 S.Ct. 1958 (1980) the defendant, a heroin dealer, refused to cooperate with police in further investigation of narcotics traffic in his community. 100 S.Ct. at 1362. The trial court therefore meted out a more severe sentence than if the defendant had cooperated. Id. In sustaining the more severe sentence the Roberts court held, 1) that part of the defendant's rehabilitation would be cooperation with law-enforcement in exposing crime in his community and 2) that there was no record basis for any claim of self-incrimination or coercion. 100 S.Ct. at 1363-1365. As in Roberts, in the case at bar there is

not a shred of evidence that the Defendant has been compelled or coerced to do anything. Indeed, under settled principles of constitutional analysis, to infringe upon the Fifth Amendment prohibitation, the testimony must be both compelled and used against the defendant. See, Lefkowitz v. Cunningham, 431 U.S. 801, at 804-805 (1977). Without use against the defendant, there is no prohibition under the Fifth Amendment. See, United States v. ManDujano, 340 U.S. 367 (1951). Furthermore, the central issue under the Fifth Amendment is not whether a Defendant has a difficult choice but whether he has a choice. See, McGautha v. California, 402 U.S. 183, at 212-213 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970). The present statute presents the Defendant only with a difficult choice

and is therefore not in violation of any constitutional precepts.

The Defendant's claims that Section 893.135 denies due process and the statute imposes cruel and unusual punishment are similarly wholly without merit. In Bordenkircher v. Hayes, 434 U.S. 357 (1978) the prosecutor in pretrial plea bargaining had told the defendant, the defendant's plea to a term of five years in prison would be acceptable, but that if the defendant did not plead guilty, that he, the prosecutor, would seek a grand jury indictment against the defendant as an habitual offender, which required a mandatory life sentence. 434 U.S. at 359. The defendant in Bordenkircher chose not to plead guilty and was subsequently convicted and sentenced to life. Id. at 360. In framing the issue, the Bordenkircher court specifically held that:

"As a practical matter, in short, this case would be no different if the grand jury had indicated Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain." [Emphasis added].

Id.

Addressing the principles which are clearly controlling herein, the court further opined that:

"By hypothesis, [a] plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after trial. See ABA Standards Relating to Pleas of Guilty §3.1 (1968); Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv.L. Rev. 564 (1977). Cf. Brady v. United States, supra, 397 U.S., at 751, 90 S.Ct. at 1470; North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162.

While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion to his trial rights, the imposition of these difficult choices [is] an inevitable--and permissible--attribute of any legitimate system which tolerates and encourages the negotiation of pleas." [Emphasis added].

Id. at 364.

Relying upon its decision in Bordenkircher, in Corbitt v. New Jersey, ___U.S.____, 99 S.Ct. 492 (1978), the court also found no constitutional disability in circumstances analogous to those possible under the statute in the case at bar. In Corbitt through a complex New Jersey system of homicide statutes, if the defendant went to trial and was convicted of first degree murder the trial judge must sentence him to life imprisonment. 99 S.Ct. at 495. If the defendant pleaded nolo contendere to the trial court and the trial court accepts his plea he could be sentenced to a sentence of "not more than 30 years" or life in the complete discretion of the trial court. 99 S.Ct. at 495-497. The Corbitt defendant chose to go to trial and was convicted of a first degree murder offense and sentenced to the mandatory life term under the statute. 99 S.Ct. at 495-496.

In rejecting the defendant's multiple constitutional claims under the Fifth, Sixth and Fourteenth Amendments, the Corbitt court held that:

"As did the New Jersey Supreme Court, we disagree. The cases in this Court since Jackson have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant not only "the possibility or certainty. . .[of] a lesser penalty than the sentence that could be imposed, after a trial and a verdict guilty . . .," Brady v. United States, 397 U.S. 742, 751, 90 S.Ct. 1463, 1470, 25 L.Ed. 2d 747 (1970), but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury."

The Corbitt court concluded its analysis, relying upon Bordenkircher thus:

"While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable '--and permissible--' attribute of any legitimate system which tolerates and encourages the negotiation

of pleas. Chaffin v. Stynchocombe, supra, at 31 (93 S.Ct. 1977). It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutional legimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty." 434 U.S., at 364, 98 S.Ct., at 668.

99 S.Ct. at 498.

In the case at bar, after his convictions, sentences and appeals, the Defendant has two choices under the statute. He may either serve the lawful term of his imprisonment or he may seek the benefit of mitigation of his sentences by substantial cooperation with the authorities. Under Corbitt, Bordenkircher and Brady and its progeny, there is simply no constitutional disability in merely providing the Defendant with the choice of "grim alternatives" upon his convictions for trafficking in narcotics in Florida.

Trafficking in narcotics is indeed a heinous crime, which is tearing at the

very fabric of our society. Clearly the legislative purpose in providing more severe penalties for such a crime has a rational basis and therefore is manifesting devoid of any defect under an equal protection claim. See, analysis, in, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Marshall v. United States, 414 U.S. 417, at 421-422 (1974); see also, Albernaz v. United States, ____ U.S. ___, 100 S.Ct. 1137 (1981). Additionally, the severity of the penalties in Section 893.135 also cannot be seriously assailed under any theory under the Eighth Amendment. See, Rummel v. Estelle, _____U.S. ____, 100 S.Ct. 1133 (1980). The extent and nature of crimes and their punishment is an exclusive legislative perogative into which no court may intrude. Id.

V

CONCLUSION

WHEREFORE, upon the foregoing, the Appellee, THE STATE OF FLORIDA, prays that this Honorable Court will enter its order affirming the judgment below and/or dismissing the Defendant's appeal.

RESPECTFULLY SUBMITTED, on this 8th day of April, 1982, at Tallahassee, Leon County, Florida.

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